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THIS POLEMIS BUSINESS.

Arnold D. McNair.

YEAR by year in lecturing on the law of contracts I am asked by successive generations of students whether the *Polemis* decision [1] applies to the measure of damages for breach of contract. This decision is one which gives no practitioner sleepless nights, but troubles the teacher and the student a good deal. It seems therefore worth while to preserve from destruction such documentary information as may throw any light upon the case beyond what is afforded by the reports of the judgments of Sankey J.[1] (as he then was) and of the Court of Appeal.[2] Accordingly, by the courtesy of Messrs. Holman, Fenwick and Willan, the solicitors for the owners of the *Thrasyvoulos*, I am able to print the following documents [3]:—

1. Points of Claim.
2. Letters of April 26, 1920, from charterers' solicitors demanding particulars and of April 28, 1920, from owners' solicitors in reply.
3. Points of Defence.
4. Respondents' (charterers') Contentions.
5. Claimants' (owners') Contentions.
6. Award and Special Case dated December 20, 1920.

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[1] (1921) 26 Com. Cas. 281; 37 T. L. R. 696.

[2] *Re Arbitration between Polemis and Another and Furness, Withy & Co., Ltd.* [1921] 3 K. B. 560.

[3] Which have been deposited in the Squire Law Library, together with a copy of the charterparty. It is summarized in [1921] 3 K. B. at p. 561, and clauses 3, 5, and the relevant portion of 21 are quoted in the judgment of Sankey J.

7. Further Finding by the Arbitrators dated February 11, 1921.
8. Judgment of Sankey J. dated May 5, 1921, which, though reported in 26 Commercial Cases and 37 Times Law Reports, is reprinted here from the transcript for the benefit of readers to whom these reports may not be available.

Repetition will be avoided by reproducing these documents at once and allowing them to tell their own story. To them I have appended a note on the relation, if any, of the decision to the law of contract, as it seems to me, without touching upon its position in the law of torts which has been fully dealt with by many writers.[4]

IN ARBITRATION.

BETWEEN

C. A. POLEMIS and L. BOYAZIDES
(Owners of the s.s. 'THRASYVOULOS')

and

FURNESS WITHY & CO., LTD.

POINTS OF CLAIM.

1. BY Charter Party dated 21st February 1917 the Owners of the s.s. 'THRASYVOULOS' let the said steamship to Furness Withy & Co. Ltd. for the duration of the war with a further option for six months to be employed in such lawful trades as Charterers may direct.

2. THE said charter party provided (*inter alia*):—

3. That the Owners shall provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew, and pay for the Insurance of the said vessel war risks excepted.

4. That the Charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commission and all other charges whatsoever except those above stated.

5. Steamer to be re-delivered on expiry of the charter party in the same good order and condition as and when delivered to Charterers fair wear and tear excepted.

11. Steamer to work night and day if required by charterers and all steam winches to be at charterers' disposal during loading and discharging and steamer to provide men to work same both day and night as required. If shore watchmen are required same to be for charterers' account.

33. That the Captain although appointed by the Owners shall be under the order and direction of the charterers in all matters.

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[4] See in particular, Pollock, 'Law of Torts' (13th ed. 1929), pp. 32—41 and 582, and in *L. Q. R.* xxxviii (1922), pp. 165—167; Salmond, 'Law of Torts' 7th ed. (by Stallybrass, 1928), pp. 152—175; and Goodhart, 'Liability for Consequences of a Negligent Act,' in 'Cambridge Legal Essays' (1926).

3. In the month of July 1917 in pursuance of directions received from the Charterers the 'Thrasyvoulos' loaded a cargo consisting of petroleum, benzine, cement, etc. at Lisbon for Casablanca and other ports on the Moroccan coast. The said steamer arrived at Casablanca on the 17th July and the discharge was forthwith proceeded with by the Defendants' agents and their employees, shore winches being required. The whole of the discharging operations were undertaken by and were under the control and directions of the Defendants.

4. Shortly after midday on the 20th July [while] the discharge of cases of benzine was proceeding ex No. 1 hold the Defendants' servants negligently and improperly caused or allowed a sling of cases which was being raised from the lower hold to swing foul of a temporary platform placed across the forward section of the 'tween decks hatches with the result that a beam of timber, part of the said temporary platform, was dislodged and crashed into the lower hold with the result that flames immediately thereafter shot up through the hatchway and in spite of all efforts made to save the said steamer she was gutted by the fire and became a total loss.

5. The Charterers are not relieved of liability for the negligence of their agents and/or servants or employees under the said charter party and the Owners' claim for loss and damage occasioned to them by reason of the negligence aforesaid. Alternatively the Claimants say that the Charterers are liable in damages under Clause 5 of the said Charter Party.

Delivered this 9th day of April 1920 by Holman, Fenwick & Willan, 1, Lloyd's Avenue, E.C., Claimants' Solicitors.

22, Great St. Helens,
London, E.C.3,
26th April 1920.

Dear Sirs,

s.s. 'Thrasyvoulos.'

We require the following particulars under the Points of Claim *viz.* :—

(1) Under para. 3—
- (*a*) of the Defendants' Agents and employees specifying them;
- (*b*) of the shore winchmen required;
- (*c*) of the undertaking by the Defendants specifying how they undertook the discharging;
- (*d*) of the control and directions specifying how the Defendants controlled and what directions they gave and what members of the Defendants so controlled directed and undertook.

(2) Under para. 4—
- (*a*) of the Defendants' servants referred to specifying them;
- (*b*) of the person or persons who placed the platform referred to.

(3) Under para. 5 of the loss and damages referred to.

Yours faithfully,

(Sgd.) DOWNING HANDCOCK MIDDLETON & CO.

Messrs. Holman, Fenwick & Willan.

April 28th 1920.

Messrs. Downing Handcock Middleton & Lewis,
E.C.

Dear Sirs,

'Thrasyvoulos.'

We are to-day in receipt of your letter of the 26th inst. The particulars you require under paragraph 5 we will of course furnish you with promptly, but the particulars called for otherwise appear to us to be quite unreasonable. Our clients have no knowledge and no information as to the names or the identity of the agents and employees of the shore winchmen, etc. The steamer was under time charter to your clients, the whole operation of discharge was in their hands and the ship had nothing whatever to do with either the engagement or direction of your clients' agents, employees or servants. As you are aware, under the time charter the shipowner and his representative, the Master, do not control or direct, or indeed intervene in the course of the discharge of a vessel.

As to the particulars under paragraph 4, we can only repeat that the conduct and regulation of the discharging operations was in the hands of your clients' servants and who they were is wholly unknown to our clients and their respective officers.

The particulars of loss and damage we will furnish you with as promptly as possible.

Yours truly,
HOLMAN, FENWICK AND WILLAN.

POINTS OF DEFENCE.

1. The Defendants admit the Charter Party but not that it is accurately set out and will refer to the same for its terms. By the said Charter Party loss and damage for fire on board was mutually excepted.

2. The Defendants admit that the s.s. 'Thrasyvoulos' loaded a cargo consisting (*inter alia*) of petroleum, benzine and cement for Casablanca and other Moroccan ports but not that such loading was in pursuance of directions received from the Charterers or at Lisbon.

3. The Defendants admit that the discharge of the said S.S. was proceeded with at Casablanca on or about the 17th July 1917 but not that such discharge was proceeded with by the Defendants' agents or employees or that shore winchmen were required or that the discharging operations or any of them were undertaken by or under the control or direction of the Defendants.

4. The Defendants deny the acts of negligence and impropriety alleged and that their servants were guilty of the same.

Alternatively the Plaintiffs' servants were guilty of contributory negligence.

PARTICULARS.

Certain cases of petrol were being transferred from the lower hold to the orlop deck instead of being discharged and the Plaintiffs' servants for the purpose of facilitating such transfer negligently placed the platform referred to in para. 4 of the Points of Claim without any or any

proper fastening and though there were fumes of petrol in the hold and without giving any or any sufficient warning with regard to the said platform.

5. The Defendants deny that any beam of timber was dislodged or crashed into the lower hold or that flames shot up or shot [5] a result of the fall of the said beam.

6. The Defendants deny that they are not relieved of liability for the negligence of their agents or servants or employees and deny that the loss and damages [6] alleged and that such loss or damage occurred in any circumstances such as to make them liable.

7. Save in so far as hereinbefore admitted the Defendants deny each and every allegation contained in the Points of Claim.

S. L. Porter.

Delivered this 29th April 1920 by Downing Handcock Middleton & Lewis of 22, Great St. Helens, E.C.3, Defendants' Solicitors.

RESPONDENTS' CONTENTIONS.

The Claimants' contention is that (1) the Respondents are liable because they undertook to deliver up the ship unless lost. (2) 'Unless lost' does not mean lost from any cause, but lost by excepted perils. (3) Fire is an excepted peril, but fire caused by negligence is not. (4) The ship was in fact lost by fire caused by negligence, and therefore not by an excepted peril.

The negligence suggested is that of the stevedores in letting a sling with cases of petrol tins strike a shifting board placed over the combing of the hatch, knocking it into the hold and thereby causing, it is said, a spark which set fire to the petrol vapour in the hold and destroyed the ship.

In reply the Respondents say:—

(1) In fact the loss was not due to a spark caused by the fall of the shifting board.

(2) If it was so caused—

A. There was no contract express or implied by the Respondents to deliver up the ship if lost.

(i) There is no express agreement in the Charter Party by the charterers to deliver up the ship in good order and condition. By clause 3 the owners have to repair. Clause 5 merely deals with the duration of hire and provides that hire shall continue even after the termination of chartered period and until the necessary repairs are completed. 'Unless lost' in that clause must mean 'unless lost by any means' and not 'unless lost by excepted perils,' otherwise the clause provides for a continuous payment of hire for ever if the ship is lost unless she is lost by excepted perils. Such a construction is contrary to clause 20.

(ii) There is no reason for implying such a term, nor can [7] . . . contrary to the provisions of clause (iii).[8]

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[5] ? down as
[6] ? occurred as
[7] ? it be implied
[8] *Semble*, clause 3 of the charterparty.

(iii) The charterers are under no liability as bailees of the ship. This is not a demise charter and they are not bailees. The phrase 'deliver up' means only 'will cease to have the right to have their goods carried.'

(iv) Fire in clause 21 means fire however caused.

The Respondents are therefore not liable by express or implied contract or as bailees to replace or repair the ship.

B. There was no negligence for which the Respondents are responsible.

(i) There was no negligence towards the Claimants and to be actionable the negligence must be negligence towards the Claimants.

To let a shifting board fall into the hold of a ship when that hold is half full of cement and petrol tins can do no harm to the ship and therefore is no negligence towards shipowners.

(ii) The danger and/or damage is too remote, *i.e.* no reasonable man would have foreseen danger and/or damage of this kind result-from the fall of the shifting board.

C. If there was negligence it was not the negligence of the Respondents.

(i) The negligence (if any) was that of the stevedores, who in any case were employed by the Cie. Transatlantique and not by the Respondents.

(ii) The only obligation (if any) on the Charterers was to provide the regular stevedores employed in the port and not negligently to choose persons to perform the discharge who are known or likely to be inefficient as stevedores.

(iii) The stevedores were acting for the mutual advantage of shipowner and charterer in the discharge no matter who may have mutually engaged them.

(iv) By clause 11 of the Charter Party winchmen (sail (?), including shore winchmen) were to be provided by Owners. Shore winchmen were for charterers account, but for charterers account means that shore winchmen were to be paid for by the charterers but to be the servants or employees of the shipowners.

CLAIMANTS' CONTENTIONS.

The Claimants contend that quite apart from the effect of the Charter Party as a contract between them and the Respondents the Respondents are liable to them in damages for the damage to the ship by fire, since that damage was caused by the negligence of the servants or agents of the Respondents when upon their ship.

The Claimants further contend that the respondents are liable for breach of the contract [8a] in the Charter Party in that: (1) The Respondents undertook to deliver up the ship unless lost. (2) 'Unless lost' does not mean lost from any cause but lost by excepted perils. (3) Fire is an

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[8a] I am told by a practitioner in the Commercial Court that the validity of the basis of this plea in contract is open to serious question. For historical reasons the form of the charterparty assumes a delivery of the vessel to the charterers, but in actual fact, according to modern practice, the ship is not delivered to the charterers, so that the phrase "re-delivery to owners (unless lost) . . . in same good order and condition . . ." is probably meaningless.

excepted peril but fire caused by negligence is not. (4) The ship was in fact lost by fire caused by negligence and therefore not by an excepted peril.

The negligence suggested is that of the stevedores in letting a sling with cases of petrol tins strike a shifting board placed over the combing of the hatch, knocking it into the hold and thereby causing, it is said, a spark which set fire to the petrol vapour in the hold and destroyed the ship.

As regards Respondents' contentions the Claimants say:

(2) (A) They agree there was no demise of the ship, but submit this is immaterial. If the Respondents even as trespassers on Claimants' ship damage her by negligence they would be liable, and if as licensees on board by virtue of the charter they so damage her, they are equally liable unless there is something in the Charter Party to excuse them. So far from there being anything to excuse them, it is clear that clause 5, and other parts of the Charter, recognise the liability of Respondents in case at the end of the Chartered service (which is what is meant by delivery up) the ship has been damaged by their action or default.

(2) (A iv) That an exception does not apply if brought about by negligence of the party seeking to rely upon it, unless there is a further express and clear exception of negligence, is settled beyond doubt by the authorities.

(B) It is a fallacy to say that a man is not liable for damages for his negligence because he could not be expected to anticipate the damage that would result. In almost every case a man is negligent because he does not, and in most cases could not reasonably be expected to, realize the damage it will cause. If he did he would be careful (cf. such a case as *Grayson* v. *Ellerman Line, Ltd.*[9]).

(2) (C) The stevedores were clearly the servants of the Charterers and so was the shore winchman under the clause in the Charter that he was to be for Charterers' account.

If it is sought to say that the Cie. Transatlantique employed them they did so either as agents for Respondents or for Respondents' sub-charterers and clause 24 of Charter Party applies.

IN ARBITRATION.

BETWEEN

C. A. POLEMIS and L. BOYAZIDES (*Claimants*)

and

FURNESS WITHY & CO. LTD. (*Respondents*).

AWARD AND SPECIAL CASE.

WHEREAS by a Charter Party dated the 21st February 1917 made between the above-named parties the Claimants (hereinafter called 'the Owners') chartered to the Respondents (hereinafter called 'the Charterers') the Greek steamship 'THRASYVOULOS' for the period of

[9] [1920] A. C. 466.

the duration of the War and at Charterers' option up to six months afterwards at a monthly rate of hire as therein mentioned.

AND WHEREAS by Clause 22 of the said Charter Party it was provided that should any dispute arise between the Owners and the Charterers it was to be referred to three parties in London one to be appointed by each of the parties and the third by the two so chosen their decision or any two of them to be final and binding.

AND WHEREAS disputes did arise between the said parties under the circumstances hereinafter set out and the Owners duly appointed as their Arbitrator the undersigned William Clifton of 17 Leadenhall Street, E.C., Solicitor, and the Charterers appointed as their Arbitrator the undersigned Aubrey Francis Wootten of 1 Temple Gardens, E.C., Barrister-at-law, and the said two Arbitrators duly appointed the undersigned Stuart J. Bevan of 2 Plowden Buildings, Temple, E.C., one of His Majesty's Counsel as Third Arbitrator.

AND WHEREAS on the hearing of the Reference it was desired that the Award should be stated in the form of a Special Case for the opinion of the Court.

NOW WE the before-named Arbitrators having taken upon ourselves the burden of the said Reference and duly considered the evidence submitted to us DO HEREBY MAKE OUR AWARD in the form of a SPECIAL CASE subject to the opinion of the Court on any questions of law arising thereon:—

1. THE claim of the Owners put forward on the Arbitration was to recover damages for the total loss of the said vessel by fire.

2. IT was provided by the said Charter Party (Clause 2) that the Steamer was let and the Charterers agreed to hire the vessel for the period aforesaid from the day she was placed at the disposal of the Charterers ready to load as therein mentioned she being then tight, staunch, strong and every way fitted for ordinary cargo service and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage and to be employed in such lawful trades between any safe ports as Charterers might direct with certain exceptions as therein mentioned.

3. BY Clause 3 of the Charter Party it was provided that the Owners should provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew for the insurance of the vessel war risks excepted and also for the engine room stores and maintain the vessel in a thoroughly efficient state in hull and machinery for ordinary cargo service.

4. BY Clause 4 it was stipulated that the Charterers should provide and pay for all the coals fuel port charges pilotages agencies commissions and all other charges whatsoever except those before stated.

5. BY Clause 5 it was provided that the Charterers should pay for the use of the vessel at the rate of £9,572 16s. 0d. per calendar month commencing on the day of delivery as above hire to continue from the time specified for commencing the Charter until the hour of her re-delivery to Owners (unless lost) at a port in the United Kingdom or Continent in same good order and condition as when delivered to them fair wear and tear excepted.

6. BY Clause 8 it was provided that the cargoes should be laden and/or discharged in any dock or at any wharf or place the Charterers might

direct where the vessel could always lie safely afloat, except where steamers of similar size usually safely lie.

7. By Clause 9 the whole reach burthen and passenger accommodation of the steamer (if any including legal deck load at Charterers' or shippers' risk and not being more than she could reasonably stow and carry) was to be at the Charterers' disposal and the Captain was to prosecute his voyages with the utmost despatch and render all assistance with ship's crew and boats.

8. By Clause 10 the Owners were to provide ropes falls slings and blocks as on board necessary to handle ordinary cargo up to two tons in weight also lanterns for night work.

9. By Clause 11 the steamer was to work night and day if required by Charterers and all steam winches were to be at Charterers' disposal during loading and discharging and steamer to provide the men to work same both day and night as required Charterers agreeing to pay extra expense (if any) incurred by reason of night work at the current local rate Overtime as per articles or custom. If shore winchmen were required same to be for Charterers' account.

10. By Clause 12 the Captain although appointed by the Owners was to be under the orders and directions of the Charterers as regards employment agency or other arrangements Bills of Lading were to be signed at any rate of freight the Charterers or their agents might direct without prejudice to the Charter and the Charterers thereby indemnified the Owners from all consequences or liabilities that might arise from the Captain so doing.

11. By Clause 20 it was provided that should the steamer be lost or missing the hire was to cease from the date when she was lost or last spoken, or if not spoken then from the date when last seen any hire paid in advance and not earned was to be returned to the Charterers.

12. Clause 21 contained the following exceptions:—The Act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and restraint of Princes, Rulers and People, collision, any act neglect or default whatsoever of Pilot, Master or Crew in the management or navigation of the ship and all and every of the dangers and accidents of the seas canals and rivers and of navigation of whatever nature or kind always mutually excepted.

13. By Clause 33 it was provided that the Captain although appointed by the Owners should be under the orders and directions of the Charterers in all matters and that it was a condition of the agreement that the Owners should on the signing of the Charter cable to the Captain that his vessel had been time chartered for the period aforesaid on the Charterers and that he was at all times and under all circumstances to follow any directions that the Charterers might give him within the limits of the Charter Party.

14. The vessel by the direction of the Charterers or their Agents in or about the months of June and July 1917 loaded at Nantes a part cargo of cement and general cargo for Casa Blanca Morocco. She then proceeded to Lisbon and was loaded with further cargo consisting of cases of Benzine and/or Petrol and Iron for Casa Blanca and other ports on the Morocco Coast.

15. She arrived at Casa Blanca on the 17th July and there discharged a portion of her cargo. The cargo was discharged by Arab workmen and winchmen from the shore supplied and sent on board by the Charterers'

Agents. The Cargo in No. 1 hold included a considerable quantity of Cases of Benzine or Petrol which had suffered somewhat by handling and/or by rough weather on the voyage so that there had been some leakage from the time in the cases [9a] into the hold.

16. On the 21st July it had become necessary to shift from No. 1 lower hold a number of the cases of Benzine which were required to be taken on by the ship to Safi and for this purpose the native stevedores had placed heavy planks across the forward end of the hatchway in the 'tween decks, using it as a platform in the process of transferring the cases from the lower hold to the 'tween decks. There were four or five of the Arab shore labourers in the lower hold filling the slings which when filled were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working.

17. In consequence of the breakage of the cases there was a considerable amount of Petrol vapour in the hold.

18. In the course of heaving a sling of the cases from the hold the rope by which the sling was being raised or the sling itself came in contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold and the fall was instantaneously followed by a rush of flames from the lower hold and this resulted eventually in the total destruction of the ship.

19. We make the following findings of fact:—

(*a*) That the ship was lost by fire.

(*b*) That the fire arose from a spark igniting petrol vapour in the hold.

(*c*) That the spark was caused by the falling board coming into contact with some substance in the hold.

(*d*) That the fall of the board was caused by the negligence of the Arabs (other than the winchmen) engaged in the work of discharging.

(*e*) That the said Arabs were employed by the Charterers or their Agents the Cie. Transatlantique.

(*f*) That the causing of the spark could not reasonably have been anticipated from the falling of the board though some damage to the ship might reasonably have been anticipated.

(*g*) There was no evidence before us that the Arabs chosen were known or likely to be negligent.

(*h*) That the damages sustained by the Owners through the said accident amount to the sum of £196,165 1s. 11d. as shown in the second column of the Schedule hereto.[9b]

20. Subject to the opinion of the Court on any questions of law arising we find and award that the Owners are entitled to recover from the Charterers the before mentioned sum and no more.

21. If the Court should be of opinion that our Award in the last preceding paragraph is correct then we direct that the Owners' costs of this Reference to be taxed shall together with our fees and expenses on the Reference and the costs of this our Award amounting to £604 14s. 0d. be borne and paid by the Charterers.

22. If the Court shall be of opinion that our Award as set out in

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[9a] ? "from time to time from the cases. . . ."

[9b] Not printed here.

paragraph 20 above is wrong then WE AWARD AND DIRECT that the Owners shall recover nothing from the Charterers and that the Owners shall bear and pay the Charterers' taxed costs of the Reference and our fees and the expenses of this Award.

23. A COPY of the said Charter Party and of the Pleadings in the Arbitration and of the contentions formulated by the two parties are annexed hereto and may be referred to as if set out in this Award.

AS WITNESS our hands this 20th day of December 1920.

Witness: G. E. LEWIS,
2, Plowden Buildings,
Temple, E.C.4.
Clerk to STUART J. BEVAN.

WM. CLIFTON.
AUBREY F. WOOTTEN.
STUART BEVAN.

2, Plowden Buildings,
Temple.
11th February, 1921

IN ARBITRATION.

POLEMIS & BOYAZIDES
and
FURNESS WITHY & CO. LTD.

FURTHER FINDING ON JUDGE'S DECISION.

Referring to our Award herein dated 20th Dec. 1920 our finding in paragraph 19 (*e*) was and is that the said Arabs were employed by the Charterers or their Agents the Cie. Transatlantique on behalf of the Charterers and that the said Arabs were the servants of the Charterers.

WM. CLIFTON.
A. F. WOOTTEN.
STUART BEVAN.

IN THE HIGH COURT OF JUSTICE.
KING'S BENCH DIVISION.
(*Special Paper.*)

ROYAL COURTS OF JUSTICE,
Thursday, May 5, 1921.

Before MR. JUSTICE SANKEY.

POLEMIS *v.* FURNESS, WITHY & CO. LTD.

JUDGMENT.[10]

SANKEY J.: This is a Special Case stated by three arbitrators who, subject to the opinion of the Court, awarded the claimants the sum of £196,165 1s. 11d. as damages for the total loss by fire of their steamship 'Thrasyvoulos.'

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[10] See 26 Com. Cas. 281; 37 T. L. R. 696.

The facts are as follows: By a charterparty dated February 21, 1917, made between the claimants and the respondents, the claimants chartered to the respondents the above-mentioned Greek steamship for the period of the duration of the war, and at charterers' option up to six months afterwards, at a monthly rate of hire, as therein mentioned.

The material clauses of the charter are 3, 5 and 21. Clause 3 provides: 'That the Owners shall provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the Insurance of the Vessel (war risk excepted); also for all the Engine Room Stores and maintain her in a thoroughly efficient state in Hull and Machinery for the ordinary cargo service.' Clause 5 provides: 'That the Charterers shall pay for the use and hire of the said vessel at the rate of £9,572 16s. 0d. (Nine thousand five hundred seventy-two pounds and sixteen shillings sterling) per calendar month, commencing on the day of delivery as above with a clean and clear hold and at and after the same rate for any fractional part of a month; hire to continue from the time specified for commencing the Charter until the hour of her re-delivery to Owners (unless lost) at a port in the United Kingdom or Continent in same good order and condition as when delivered to them fair wear and tear excepted.' Clause 21 provides: 'The Act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and/or restraint of Princes, Rulers and People, collision, any act, neglect, or default whatsoever of Pilot, Master or Crew in the management or navigation of the ship, and all and every of the dangers and accidents of the seas, canals and rivers, and of navigation of whatever nature or kind always mutually excepted,' and I need not read the rest of the clause.

The vessel, by the direction of the charterers or their agents, in or about the months of June and July, 1917, loaded at Nantes a part cargo of cement and general cargo for Casa Blanca, Morocco. She then proceeded to Lisbon and was loaded with further cargo, consisting of cases of benzine and/or petrol and iron for Casa Blanca and other ports on the Morocco coast. She arrived at Casa Blanca on July 17 and there discharged a portion of her cargo. The cargo was discharged by Arab workmen and winchmen from the shore supplied and sent on board by the charterers' agents. The cargo in No. 1 hold included a considerable quantity of cases of benzine or petrol, which had suffered somewhat by handling and/or by rough weather on the voyage so that there had been some leakage from the tins in the cases into the hold. On July 21 it had become necessary to shift from No. 1 lower hold a number of the cases of benzine which were required to be taken on by the ship to Safi, and for this purpose the native stevedores had placed heavy planks across the forward end of the hatchway in the 'tween decks, using it as a platform in the process of transferring the cases from the lower hold to the 'tween decks. There were four or five of the Arab shore labourers in the lower hold filling the slings which, when filled, were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working. In consequence of the breakage of the cases there was a considerable amount of petrol vapour in the hold. In the course of heaving a sling of the cases from the hold, the rope by which the sling was being raised, or the sling itself, came in contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold,

and the fall was instantaneously followed by a rush of flames from the lower hold, and this resulted eventually in the total destruction of the ship.

The award was remitted to the arbitrators for further findings, and their findings of fact are as follows: (See above.)

As above stated, the arbitrators found in favour of the claimants.

The respondents contend (1) that the damages are too remote, and (2) that they are excused either by clause 5, which provides that they shall pay for the use and hire of the vessel until the hour of her re-delivery to the claimants, unless lost, or by clause 21, by which fire, as they allege, was an excepted peril.

As to (1), are the damages too remote? The case relied upon by the respondents is *Sharp* v. *Powell* (reported in (1872) L. R. 7 C. P. 253), and the *dictum* of Pollock C.B. in the case of *Greenland* v. *Chaplin* (reported in (1850) 5 Ex. 243), where he says that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur. This *dictum* was approved by the Court of Appeal in the case of *Cory Brothers* v. *France, Fenwick & Co. Ltd.* [1911] 1 K. B. at p. 122.

I am of opinion that those cases are clearly distinguishable from the facts in the present case. In *Sharp* v. *Powell* the defendant's servant, in defiance of a local bye-law, washed his master's cart in the street, and the water spread over a large area and subsequently froze, with the result that the plaintiff's horse slipped and sustained injuries, when it was held that the damages were too remote. The case of *Greenland* v. *Chaplin* resulted from a collision between two steamboats, and the plaintiff was successful.

In the present case, the respondents were in possession of the claimants' vessel. The respondents' servants were engaged in the work of discharging her, and although Finding (*f*) of the arbitrators is that the causing of the spark which kindled the petrol vapour could not reasonably have been anticipated from the falling of the board, I do not think that that affects the legal position. As above stated, the respondents were in possession of the claimants' ship; they have been found to have been guilty of negligence, and it was that negligence which caused the destruction of the vessel. There is a negligent act and consequent damage which under the peculiar circumstances renders the respondents liable. It appears to me to be a case of mere damages by negligence of the respondents' servants.

I cannot help thinking, although I do not for a moment suggest that the case took an unreasonable time, that it is the largeness of the award which is responsible for the length of the argument.

As to the second point, I am of opinion that the words 'unless lost' in clause 5 do not excuse the respondents because they do not refer to the case of destruction of the vessel by fire caused by the respondents' negligence. The same reasoning applies to the fire referred to in the exception clause 21.

In the result, the award of the arbitrators was correct and must be upheld.

Mr. MacKinnon: The owners will have the costs of the hearing, my Lord?

Sankey, J.: Yes.[11]

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[11] A discussion then followed as to the terms of a stay.

NOTE.

The judgment of Sankey J. was upheld by the Court of Appeal [12] (Bankes, Warrington and Scrutton L.JJ.), and the shipowners recovered the value [13] of their ship which had been destroyed in this unexpected manner as the direct consequence of the negligence of the charterers' servants. The essence of the decision is perhaps expressed by Warrington L.J. (as he then was) as tersely as could be done in the following passages [14]:—

'The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act.' . . . 'In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see *per* Lord Sumner in *Weld-Blundell* v. *Stephens*' [1920] A. C. 983, 984.

That the measure of damages thus enunciated applies to damages in actions of tort has been generally accepted. On the question whether or not it applies to actions for damages for breach of contract there is difference of opinion.[15]

In *Hambrook* v. *Stokes Brothers* [16] a remark by Sargant L.J. suggests that in his opinion the *Polemis* principle is confined to cases 'in which there was a duty by contract between the plaintiff and the defendant' and does not apply to actions in tort. Reasons for differing from this view will be given later.

There are, moreover, two learned writers who have been visibly perturbed by the possible effect of the *Polemis* decision upon the rules governing the measure of damages for breach of contract, and I propose, with the deepest respect for their

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[12] [1921] 3 K. B. 560.

[13] Amounting, together with some incidental loss, to £196,000.

[14] At pp. 574, 575.

[15] The learned editors of the 17th edition of Anson, 'Law of Contracts' (1929) (Miles and Brierly) do not mention the *Polemis Case* (quite rightly, I submit). In Chitty's Law of Contracts (18th ed. 1930) (Macfarlane and Wrangham), at p. 953, the *Polemis Case* is treated as relevant to the measure of damages for breach of contract and as qualifying or explaining *Hadley* v. *Baxendale*. In Mayne on Damages (10th ed. 1927) (Gahan), *passim*, the *Polemis Case* is treated as relevant to tort and breach of contract alike but not as disturbing *Hadley* v. *Baxendale*. The decision of the Privy Council in *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co., Ltd.* (1924) 41 T. L. R. 21, though the *Polemis Case* is not mentioned, deserves notice.

[16] [1925] 1 K. B. at p. 164.

authority, to comment upon their views, premising however that I have every reason to suppose that they have not yet read all the documents printed above. These two writers are, first in point of time, Professor Winfield [17] and, secondly, Sir Frederick Pollock.[18] In both, as it seems to me, the instinctive reaction to the *Polemis* decision so far as concerns the law of contracts is similar. Professor Winfield, after pointing out that 'the case itself arose on a clause in a charterparty which, of course, is a contract,' and after commenting upon the persistence of writers on the law of contract in ignoring the decision, says: 'It is, however, perhaps safe to infer from *Weld-Blundell* v. *Stephens* that the principle of the *Polemis Case* includes all contracts, subject to a qualification shortly to be stated.' The qualification referred to appears to be that 'where there are special circumstances in a contract wholly unknown to the defendant, he is not liable for damages solely due to those special circumstances, though he is liable for general damages, upon which *Hadley* v. *Baxendale* [19] is cited. If that be the qualification referred to, I am at a loss to know how it can be deduced from the *Polemis* judgments. There the liability of the charterers is based on the directness of the consequences of their servants' negligence, not upon any knowledge of special circumstances, for the arbitrators found as a fact 'that the causing of the spark could not reasonably have been anticipated from the falling of the board. . . .'

No further edition of Sir Frederick Pollock's 'Principles of the Law of Contract' has appeared since the *Polemis* decision was given. But in the thirteenth edition of his 'Law of Torts,' appearing in 1929, it is evident [20] that he has been impressed by Professor Winfield's suggestion that, a charterparty being a contract, the *Polemis* decision (subject to a qualification) covers damages for breach of contract. Sir Frederick, while inclining to accept Professor Winfield's view, concludes that 'the result, surprising as it may seem, appears to be that the judgments in *Polemis' Case* were delivered *per incuriam* as regards the nature of the cause of action, and the reasons given are only extra-judicial opinions fully open to reconsideration,

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17 Salmond & Winfield, 'Law of Contracts' (1927), pp. 506, 507.

18 'Law of Torts' (13th ed. 1929), pp. 32—41, *et passim.*

19 (1854) 9 Exch. 341.

20 At p. 38, and see the following extract from the Preface: 'My learned friend Prof. Winfield's discovery that the doctrine laid down in *Polemis' Case* was, in its application to the cause of action before the Court of Appeal in that case, in conflict with the rule in *Hadley* v. *Baxendale* is noted at pp. 37—39.' I think that Professor Winfield's language is somewhat more guarded than this comment would suggest.

and perhaps not binding even in Courts of first instance. For the present, however, a text-writer can only proceed on the footing that an authentic rule (however different from the rule in contract) has been laid down as to the limit of consequential damages in actions of tort, and that, accordingly, the earlier authorities lose, in England, much of their authority.'

Whatever doubt Sir Frederick Pollock may have as to the effect of the decision upon the law of damages in tort, he cannot bring himself to believe (in spite of the charterparty) that the old measure of damages for breach of contract has been disturbed, for later [21] he says:

'We have seen in an earlier chapter that according to the rule now laid down by the Court of Appeal [in the *Polemis Case*] the contemplation of the party liable (actual or presumed) is not the proper test of remoteness when once liability in tort is established; but it is conceived this could not be used to enlarge the damages in any case where the cause of action was decided or allowed to be substantially in contract.'

In the cases both of Professor Winfield and Sir Frederick Pollock the effect produced by the *Polemis Case* is similar, namely, reluctant acknowledgment of the apparent application of the decision to the measure of damages for breach of contract, followed by an instinctive shrinking from this off-handed shattering of old-established principles. That instinctive reaction appears to me to be abundantly justified.

I venture to suggest, with great respect, that a perusal of the documents printed above might alter the views of Sargant L.J. and the two learned writers previously quoted as to the nature of the cause of action in the *Polemis Case* and as to the effect of that decision. In short, I submit that, in the light of the foregoing documents, the *Polemis* decision is not an authority upon the measure of damages for breach of contract and must be confined in its effects to the law of tort; the shipowners' claim was pleaded alternatively in contract and in tort, but they obtained judgment in tort. In support of this submission I beg to make the following comments upon the case:—

(1) It is true that a charterparty is a contract and that the steamer was placed at the disposal of the charterers upon the terms of a charterparty. In a similar way a passenger's ticket explains his presence on a railway platform or in a railway carriage and governs the liability of the railway company in so far as its terms may be relevant to that liability.

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[21] *Op. cit.* at p. 582.

(2) But the existence of a charterparty, while it enables the charterer to plead any relevant terms of the charterparty which may protect him, does not mean that a claim made against him by the owners for damages for negligence must be a claim based on contract; it may still be in tort.[22] In an action of tort either party may plead by way of protection a provision of the charterparty.

(3) Paragraph 4 of the Points of Claim states the claim as one based on negligence—'the defendants' servants negligently and improperly caused or allowed,' etc. Paragraph 5 denies by anticipation the existence of any relevant terms in the charterparty which are available to the charterers to protect them.

(4) The last sentence in paragraph 5 appears to state an alternative claim based on contract, namely, an implied term to re-deliver to the owners 'in same good order and condition as when delivered to them, fair wear and tear excepted.' This is dealt with below (8).

(5) The Points of Defence and annexed Particulars treat the claim as one based on negligence and do not specifically refer to the alternative claim mentioned in the preceding paragraph.

(6) In the Contentions of the two parties both the claim based on negligence and the claim based on breach of contract to deliver up the ship are dealt with and are treated as being distinct.

(7) The arbitrators were silent as to the cause of action upon which they based their award, but found as facts that 'the fall of the board was caused by the negligence of the Arabs' and that 'the said Arabs were employed by the charterers or their agents, the Cie Transatlantique, on behalf of the charterers and . . . were the servants of the charterers.'

(8) Turning to the judgment of Sankey J., the defence—equally relevant whether the claim is based on contract or on tort—which rested upon clause 5 of the charterparty is briefly dismissed by pointing out that the qualification which is placed by the words 'unless lost' upon the obligation to re-deliver the ship does not operate because those words cannot include a loss resulting from the charterers' own negligence; the same reasoning disposes of the defence based on the exception of 'fire' contained in clause 21. Apart from that, the learned judge treated the case purely as one of tort and applied himself to

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22 See Pollock, *op. cit.* at p. 560: 'But injury which would have been a tort, as breach of a duty existing at common law, if there had not been any contract, is still a tort,' citing *Taylor* v. *Manchester, Sheffield & Lincolnshire Ry. Co.* [1895] 1 Q. B. 134, and see particularly A. L. Smith L.J. at p. 140.

the question of remoteness of damage. He said: 'There is a negligent act and consequent damage which under the peculiar circumstances of the case renders the respondents liable. It appears to me to be a case of mere damages by negligence of the respondents' servants.'

(9) The foregoing brief examination of the history of the case before it reached the Court of Appeal seems to me to make it easier to place the judgment[23] of that Court in its true setting. Counsel for the charterers (appellants) appear to have abandoned the claim based upon an implied contractual obligation to deliver up the ship and make no reference to clause 5 of the charterparty. Their two points are (i) that the damages awarded by Sankey J. are too remote; and (ii) that the charterers are protected by the expression 'fire always mutually excepted' occurring in the exceptions clause in the charterparty. The second point was easily disposed of by the respondents by invoking the requirement of an express term if it is desired by a shipowner (or in this case a charterer) to protect himself against the consequences of a peril brought into operation by the negligence of his servants.

(10) The judgments of the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.) are familiar to all readers, and it is unnecessary to make more than two comments. (i) Throughout they treat the action as a claim for damages for negligence, that being the cause of action upon which Sankey J. gave the judgment appealed from. (ii) Nowhere do they refer to *Hadley* v. *Baxendale*,[24] which it would have been impossible to ignore if they had been laying down a principle governing the measure of damages in tort and in breach of contract alike, and which, decided in the Court of Exchequer, has since been recognized by the Court of Appeal[25] and is so well established that even the House of Lords would hesitate to disturb it.[26]

(11) The principle governing the measure of damages for breach of contract is, as I understand it, that *prima facie* the party injured by the breach of contract should recover from the contract-breaker the whole amount of his loss, subject to the limitations imposed by such decisions as *Hadley* v. *Baxendale* and *Horne* v. *Midland Ry. Co.* What are these limitations?

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[23] [1921] 3 K. B. 560.
[24] (1854) 9 Exch. 341.
[25] In *Hammond & Co.* v. *Bussey* (1887) 20 Q. B. D. at p. 87.
[26] See Pollock, *op. cit.* at p. 38.

Hadley v. *Baxendale*, stated shortly, lays down two rules[27]; the first, relating to general damages, requires that such damages to be recoverable must be 'such as may fairly and reasonably be considered either arising naturally, *i.e* according to the usual course of things,[28] from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' The second rule, relating to special damages, which is illustrated by *Horne* v. *Midland Ry. Co.*, requires that 'if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily flow from a breach of contract under these special circumstances, so known and communicated.'

In the *Polemis Case* there was an express finding by the arbitrators 'that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated.' I submit that if the shipowners could only have sued the charterers for breach of contract, that finding of fact would have been fatal and would have prevented them from recovering the value of the ship. It could not be said either that the destruction of the ship by fire in this peculiar way arose 'naturally, *i.e.* according to the usual course of things'[29] from the breach of contract, or that it was 'in the contemplation of the parties at the time they made the contract as the probable result of the breach.' Further, there is no allegation that any 'special circumstances' were communicated to the charterers. Surely the essential factor governing the measure of damages for breach of contract is that the courts awarding compensation for the breach are limited to such compensation as may reasonably be supposed or actually be proved to have been in the minds of the contracting parties at the time of contracting as

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[27] *Per* Alderson B., at p. 354.

[28] And therefore, I submit, within the contemplation of the ordinary reasonable man.

[29] The expression 'naturally, *i.e.* according to the usual course of things' means, it is submitted, what normally happens 'in the great multitude of [similar] cases,' and probably will happen in the case under consideration (see Alderson B. *loc. cit.*). 'Natural' here clearly cannot be used in the literal sense—see Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A. C. at p. 983: 'Everything that happens, happens in the order of nature and is therefore "natural."' If that is all that 'natural' meant in *Hadley* v. *Baxendale*, it would be meaningless.

the consequence of non-performance of the contract. 'Anticipation,' or 'contemplation,' or 'expectation,' seems to me to run through the decisions upon measure of damages for breach of contract.[30] But in tort, or at any rate in actions based on negligence, we are now expressly told by the Court of Appeal in the *Polemis Case* that 'anticipation' is in point of damages irrelevant.

It is this mental element of anticipation, contemplation, expectation, which, I submit, characterizes the measure of damages for breach of contract; whereas in tort (or at any rate in actions based on negligence) the test is simply causation. The contract-breaker breaks a self-imposed duty, and it is therefore intelligible that in determining the damages the question of what was or ought to have been in his mind (at the time when it assented or is deemed to have assented to the assumption of the duty) as the consequence of a breach of that duty should be the material question.[31] The tortfeasor, on the other hand, breaks a duty imposed by law and it is intelligible that, once that breach of duty is established, the amount of damages should depend upon the purely objective test of causation.

(12) If the *Polemis* decision applies to damages for breach of contract, *Hadley* v. *Baxendale*, *Horne* v. *Midland Ry. Co.* and many similar cases must be scrapped; for their essence is the limitation of the damages which in fact result from a breach of contract by the amount of knowledge which the contract-breaker had or ought to have had, at the time of making the contract, as to the probable consequences of his breach of contract, whereas the essence of *Polemis* is direct causation.

(13) Some of the statements[32] to the effect that the measure

[30] It may sometimes be objective, as in *Cory* v. *Thames Ironworks Co.* (1868) L. R. 3 Q. B. 181.

[31] See Blackburn J. in *Cory* v. *Thames Ironworks Co.*, *supra*, at p. 190: 'The measure of damages when a party has not fulfilled his contract is what might reasonably be expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, *viz.*, that if the damage were exceptional and unnatural damage, to be liable for that would be hard upon the seller, because if he had known what the consequences would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-fulfilment of his contract.' This passage brings out well the mental element in the measure of damages for breach of contract. 'Natural' is clearly used in the sense of 'probable,' 'normal,' 'to be expected.'

[32] *E.g.* Brett M.R. in *The Notting Hill* (1884) 9 P. D. at p. 113; Bowen L.J. in *Cobb* v. *Great Western Rly. Co.* (1893) 62 L. J. Q. B. at p. 337, cited by Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A. C. at p. 979

of damages is the same in contract and in tort will, I venture to think, require further consideration and perhaps qualification. In this note I am not attempting to explore that question [33] or any other question arising on the frontier between contract and tort. I am content to endeavour to establish the opinion that, whether or not the measure of damages is the same in contract and in tort, there is nothing in the decision in the *Polemis Case* which compels us to hold that the principle which it declares or enunciates as to remoteness of damage applies to actions for damages for breach of contract.

(14) In short, it is submitted that the rule as to the remoteness of damage laid down in the *Polemis Case* must be confined to tort and has no application to breach of contract, so that Mr. Hadley and Mr. Baxendale and many others whose money and public spirit have contributed to build up the rules governing the measure of damages for breach of contract may sleep quietly in their well-earned beds and pay no heed to any attempts to wake them up.[34]

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[33] Which is very far from being a simple one in view of the tortious origin of the action of assumpsit which, as Sir Frederick Pollock says (' Law of Torts ' (13th ed.) (1929), at p. 555) ' from a variety of action on the case . . . had become a perfect species, and in common use its origin was forgotten.'

[34] I am glad to find that the learned editor (Stallybrass) of the seventh edition of Salmond's ' Law of Torts ' (1928) (see p. 157, note 2) is also of the opinion that *Hadley* v. *Baxendale* is not overruled by *Re Polemis*.

[Dr. McNair's article, with its admirable documentation, will be welcomed as a luminous statement of the practical effect of *Re Polemis* in relation to remoteness of damage in the law of tort and the law of contract. As to that practical effect, I think that there is not (and never has been) any difference of opinion between Dr. McNair and myself. *Hadley* v. *Baxendale* is still good law in spite of, or irrespective of, *Re Polemis*. As to the precise theoretical form in which the result of the two cases in relation to one another ought to be stated, I venture to suggest that there is still more to be said, and I am not yet entirely convinced that the statement made in Salmond & Winfield, ' Contracts,' ought to be revised. One of the difficulties is that while the C. A. appear to have decided *Re Polemis* on the ground of tort, every one of the learned Lords Justices cited passages from Lord Sumner's speech in *Weld-Blundell* v. *Stephens*, which related to remoteness of damage in both tort and contract; and *Weld-Blundell's Case* itself, be it noted, was one on contract.—P. H. WINFIELD.]

LAW REFORM.

H. A. Hollond.

In Quest of Justice, by Mr. Claud Mullins,[1] the author of *The Leipzig Trials*, is a notable book. Mr. Mullins is a successful practising barrister, who has also had some experience as a Deputy County Court Judge. He is not as young as might be inferred from the statements made in Sir Leslie Scott's introductory letter that a young man need not fear criticism for taking up the subject of law reform, and that reforms almost always come from the young. The Law List reveals that he won a Certificate of Honour in 1912 and was called to the Bar in 1913.

The composition of the book has been one of the principal occupations of the author's leisure hours during several years. This fact is doubtless responsible for lack of orderly arrangement and for redundancies: it does not explain or excuse the absence of references, which is infuriating to anyone who wishes to use the book for serious purposes. It is to be hoped that this defect will be remedied in a later edition.

But these defects ought not to qualify the gratitude deserved by Mr. Mullins for the really great service which he has rendered to the community by calling attention to the need for reforms which will reduce the expense of litigation. His book appears at an opportune moment, following as it does close upon the report of the sub-committee of the London Chamber of Commerce, which was issued in April, 1930. Frequent repetition is needed to force a realization of the financial disasters of litigation upon the minds of barristers and judges otherwise unsullied by such sordid matters as costs, and unharassed by visions of the privations of ruined laymen. 'Litigation is a game, a gorgeous game,' Mr. E. F. Spence has written; he might have added that there is this difference between it and other gorgeous games that it is not paid for by the players.

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[1] *In Quest of Justice.* By Claud Mullins, of Gray's Inn and the Middle Temple, and of the South-Eastern Circuit, Barrister-at-Law. London: John Murray. 1931. xvi and 448 pp. (12*s.* net.)

The law occupies a position of greater prestige in the history of England than in that of any other country. What other sphere of work can boast the foundation of so many noble houses? The glory of the law blinds the eye to the tragedies upon which the noble edifice is reared, no less than the glories of mediaeval cathedrals and castles banish thought of the miseries of those who hewed their stones.

Law reform is a task of intense difficulty. The ablest lawyers of any age have generally been opposed to change. Mr. Mullins tells us of Lord Eldon (p. 310) that 'from the abolition of the slave trade to the construction of the Great Western Railway; from the Reform Bill and the emancipation of Roman Catholics to the allowing of dissenters to be married by their own pastors in their own chapels; from the prohibition of the sale of offices connected with the administration of justice to the establishment of county courts, he consistently confronted change with his stern and sturdy opposition.' Similar statements could be made of many others. And as law reform can only be effected by lawyers, the opposition of such men is apt to prove fatal. It is not that they consciously advocate the retention of complexities which bring profit to their kind, but long training along particular lines has made them more interested in the Law as an end in itself, as a purely intellectual scheme of thought, rather than as a means to the human object of redressing wrongs within the limit of what is possible. How many of our successful lawyers have continually before them Hale's great words: 'We must remember that laws were not made for their own sakes, but for the sake of those who were to be guided by them. If they are become unuseful for their end they must either be amended or new laws be substituted'?

The indisputable fact which justifies clamour for inquiry is the cost of litigation. The magnitude of the evil is not realized because the facts are known only to litigants and their solicitors. Mr. Mullins has usefully published some specific illustrations, selected from among both great and humble causes. One of his instances is a claim in a London County Court for the return of a loan of £100; the defendant did not appear at the trial; the taxed costs of the plaintiff were £55 11s. 6d. In the case of a claim of £40 for work done the plaintiff recovered £25; the defendant had to pay in addition to that sum £24 costs to the plaintiff and his own solicitor's bill, probably at least £20. In a motor car accident case, in which the plaintiff obtained a verdict for £230, the costs of the plaintiff alone were £105. In a case in which the sum of £40,000 was claimed against under-

writers the plaintiff lost in the King's Bench Division, won in the Court of Appeal, and lost in the House of Lords by two votes to one. He had to pay, in addition to his own costs, the defendants' costs taxed at £89,000.

The responsibility for this disastrous situation must be shared between our law of procedure, our law of evidence, and our substantive law.

In the law of procedure litigants are hampered by the intricacies and superfluities of interlocutory proceedings. 'What we wish to emphasize,' says the Chamber of Commerce report, 'is that a simplified procedure should be compulsory.' The Commercial Court, instituted in 1895, uses with great success a simplified procedure. A note printed in the Annual Practice states that the reason for creating this Court was that 'there was great delay, inconvenience and expense in the ordinary procedure.' Mr. Mullins' comment is that 'there is no reason for giving privileges to a city merchant who claims thousands of pounds on an insurance policy, and leaving to the dilatory and expensive ordinary procedure a landlord who wants £100 from his tenant, or anybody else who seeks the King's justice.'

It is encouraging that the importance of procedural reform was publicly emphasized by our present Lord Chancellor, before he assumed the responsibilities of office. In March, 1928, Lord Sankey, then a Lord Justice, in a lecture delivered before the University of London, described the preliminary stages of an action in the High Court as frequently vexatious, and urged the need of inquiry with a view to evolving some quicker and more convenient method of achieving results.

Secondly come the rules of evidence. It may be true that these rules are the perfection of reason and experience. But as the Chamber of Commerce committee has pointed out the best of its kind may be too expensive for the workaday world. Actually it may well be questioned whether our rules of evidence, the evolution of which was determined by jury trial, are the most perfect for non-jury trials. Much evidence which it is wise to exclude from a jury because it may mislead, may be useful to a judge whose training has taught him what degree of value should be attached to it in comparison with other evidence. And is any useful purpose served by requiring readiness to prove minutely all documents and facts by personal testimony of the parties and witnesses, when there are other methods of proof, not strictly the best evidence, which would be accepted as conclusive by any business man?

Another source of expense in connexion with the law of

evidence is the latitude allowed to cross-examiners. The extent to which counsel are allowed in cross-examination to attack the character or *bona fides* of witnesses arouses astonishment in foreign lawyers.

It is doubtful whether extensive use of this power often serves a useful purpose. The authority of Lord Abinger is cited for the view that more mischief than benefit generally results from it. And it is certain that it leads to an intolerable prolongation of the duration of trials. Notable amongst cases prolonged by cross-examination are the *Tichborne Case* in 1871—2, and the case of *Belt* v. *Lawes* in 1882, about the Byron statue in Hyde Park.

A class of evidence which the existing rules of Court do not adequately keep within bounds is expert evidence. *Graigola Merthyr Co., Ltd.* v. *Swansea Corporation* [1928] Ch. 31 is a notable illustration. The plaintiff company, colliery owners, unsuccessfully applied for an injunction restraining the corporation from using a reservoir above a coal mine. The trial lasted for sixty days, and the costs of one side alone amounted to about £77,000. At its conclusion Tomlin J. (now Lord Tomlin) made the following observations (at p. 38): 'Of late years cases involving expert evidence appear to have increased in number and in length. Having regard to the complexity of modern life and the widened field over which science ranges, this is perhaps inevitable, but the over-loading of these cases in the preparation of them is becoming not infrequent. Long cases produce evils; they place the parties with the lesser resources at a grave disadvantage, and they delay the course of the general business of the Courts and thereby inflict serious hardship on other litigants. In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible, and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge. If it should prove not to be generally appreciated or properly discharged, it may become a matter for consideration whether some change in the method of trial should not be made. The present case was begun in 1920. For six years materials were amassed. Experts on both sides paid numerous visits to the *locus in quo*, both underground and on the surface, but the experts never met on the spot to see whether, as to physical appearances in the mine or

on the surface, they could not reach a measure of accord, nor was any other step taken to reduce the issues open at the trial. In consequence this case had become unmanageable before the trial began, and notwithstanding efforts by counsel on both sides during the trial to shorten matters, many days were occupied in hearing evidence on points with regard to which there ought not to have been any difference, with the result that the trial, in my judgment, lasted too long. I think that all concerned in litigation of this class must in future in the preparation of their cases more closely address their minds to restricting the area of dispute.'

Another abuse in connexion with evidence, which might be more easily remedied, is that of insufficient accuracy in estimating the time at which cases will be called. It appears that the authorities are too much concerned with avoiding the danger of a judge being left without any work in Court, and too little with the abuse of parties being compelled to pay for the attendance of lawyers and witnesses on days when their case is not heard. If there is substantial truth in Mr. Mullins' allegations on this subject, it is clear that there is need for immediate action on the part of those responsible for this most serious state of affairs.

We turn, lastly, to the substantive law. Most educated laymen know that on many subjects the legal rule has to be laboriously extracted from what Mr. A. P. Herbert has called 'that confusing forest of learned judgments which constitutes the common law of England.' Few know how frequently a lawyer must confess that it is impossible to know what the law is with regard to a particular question. The *casus improvisus* must of course always be with us, however perfect the state of the legal system, but English law abounds in known *lacunae,* waiting to be filled at the expense of unfortunate litigants. Mr. Mullins mentions some well-known unsolved problems (pp. 93—99); the examples given by him are but specimens taken at random out of an infinite number.

Absolute completeness and certainty of the law are unattainable, but we need not therefore acquiesce in a system which treats unreported cases as binding authority. Mr. Mullins cites *Palgrave, Brown & Son* v. *S.S. Turid* [1922] 1 A. C. 397, which was decided upon the authority of a case reported nowhere but in the news columns of *The Times* of 1877, and quotes Lord Sumner's striking words (at p. 413): 'I have often wondered what would happen, if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House,

and the transcripts of your Lordships' opinions preserved in the Parliament office, a selection of "Unnoticed House of Lords Cases." The results might be somewhat unexpected, but the decisions themselves all Courts, your Lordships' House included, would be bound to follow, wherever they applied.'

Although it may be accepted that the expense of maintaining the machinery of litigation ought to be borne by litigants, it does not follow that they ought to bear, as they have done for centuries, a large part of the cost of law making. Law is a monopoly of the State, and it seems reasonable that the State, as monopolist, should undertake the task of making the law complete and knowable, and that of providing judges competent to know and apply it. Some would therefore go further than Mr. Mullins, who would remit Court fees upon a successful appeal, and would hold it reasonable that when a judge of first instance is reversed on a question of law, the State should to some extent at any rate indemnify the parties against the loss resulting to them from the inefficiency of the State-provided machinery. As to the possibility of diminishing the occasions for appeals on questions of law Mr. Mullins makes some bold and valuable suggestions. He advocates Lord Selborne's policy of a single appeal, temporarily adopted in the Judicature Act of 1873. He also makes the momentous proposal that the Lords of Appeal should be retained as an advisory body responsible under the presidency of the Lord Chancellor for the continual repairing of the legal structure. There are several ways in which such a House of Lords might be utilized. First it might be made available as a Court of reference on any questions of law considered by judges to require an authoritative pronouncement for the purpose of the decision of cases before them. Secondly, it might be charged with the duty of laying before Parliament proposals for a re-statement of the law on particular topics, when judgments have been pronounced which if not overruled would constitute unsatisfactory precedents. Thirdly, it might be charged with the duty imposed on the judges by the Judicature Act (now section 210 of the Act of 1925), and strangely ignored by them, of considering at least once a year the operation of the rules of Court. Fourthly, the House could 'supervise the gradual and progressive codification of our vast judge-made law.' And, lastly, Mr. Mullins suggests that the House might be entrusted with the task of improving the drafting of political Bills.

Professional opinion changes so slowly that I doubt whether there is a possibility of any such scheme being adopted. But

I am convinced that if tried it would be successful, for a reason which can be briefly stated.

The finger of scorn is often pointed at the inadequacies of law reform, so called, hitherto undertaken by the Legislature. But the reason for the inadequacies is, I think, never pointed out, namely, that the work of preparing legislation involves little emolument and no professional glory. The constructive ability required for law building and the technical skill required for successful draftsmanship are rare. Those who possess them are generally making enormous incomes which they are not prepared to sacrifice. The prestige of a peerage with the emoluments of a Lordship of Appeal would induce men of such calibre to undertake the important but neglected function of making law to meet the contingencies of the future. In their hands there is no reason why law reform should not be a success instead of a failure.

It would, in my opinion, be necessary that a House of Lords, entrusted with such functions, should be served by a staff of trained lawyers, ranking as civil servants, who could do the necessary devilling. There might even, in an ideal world, be some interchange between such civil servants and that class of legal scholars who in any other country have greater influence upon the development of law than in ours, namely, the teachers of law.

ROMAN LAW AS ILLUSTRATED IN PLINY'S LETTERS.

D. T. Oliver.

THE interest of students commencing the study of Roman Law would, I think, be greatly stimulated if the commentaries on the texts of the Institutes were furnished, as amply as the material available renders possible, with illustrations of the actual operation of the law in practice. It not only aids the understanding, but affords a great relief to the mind to be able to turn from the study of the abstract rules *in vacuo*, so to speak, and to observe their application in the actual circumstances of life at different periods. From the works of Cicero may be gathered a rich store of examples of the working of Roman Law at the end of the Republic, and in the Letters of Pliny we have much material which illustrates the rules and practice of the law in the period immediately preceding the age of the Antonines.

In the brief paper which follows I have endeavoured to present instances, taken from the letters, which are useful by way of illustration of the subject-matter of the Institutes of Gaius or which throw light on the administration of the law of the period. Many of the letters refer to criminal impeachments before the Senate in which the writer was engaged, but these are outside the scope of my present task. In quoting from the letters I have followed Melmoth's excellent translation, only modifying it where it is desirable to emphasize words with a technical significance. For the most part I have reproduced the actual words of the letters without attempting a summary.[1]

It may be desirable in the first place to give a few details of Pliny's life and career. He was the nephew and adopted son of the Pliny who wrote the well-known Natural History and who was one of the victims of the great eruption of Vesuvius, in 79 A.D., when the cities of Herculaneum and Pompeii were over-

[1] The edition of Melmoth's translation of the Letters which I have used is one printed at Edinburgh in 1807 by James Ballantyne & Co. for a combination of publishers.

whelmed and buried. The younger Pliny was with his uncle at the time and gives an account of the event in two letters (VI, 16 and 20) which he addressed at a later period to his friend Tacitus, the historian. Born at Como, in 62 A.D., he had all the advantages which the state of education at the time afforded. He studied rhetoric under Quintilian and began his career as an advocate at the early age of nineteen, as he informs us in a letter to one of his friends (V, 8; to Capito). He held successively most of the offices in the official hierarchy, and attained the consulship under Trajan, who, later, appointed him to the governorship of the province of Bithynia. He died about the year 114 A.D., three or four years before the accession of Hadrian (A.D. 117). For the greater part of his life he was engaged in the practical work of the Courts either as an advocate or in the exercise of magisterial functions. In a letter (I, 23) to Pompeius Falco, he discusses the propriety of continuing to practise as an advocate while holding a magistracy, stating that it was his own rule to abstain entirely from appearing as an advocate during the period he was holding a magistracy. He says: 'I thought it unbecoming a magistrate, who, upon all occasions, has a right of precedency, and in whose presence every person is obliged to rise, to be seen standing, while all about him were seated; that he, who has authority to impose silence on any man, should himself be directed when to cease speaking; that he, whom it is held impious to interrupt, should be exposed to the scurrilous liberties of bar orators; which to chastise would be thought a sort of insolence of office, and yet it would be weakness to overlook. I considered, further, the great difficulty I should be under, if either my client or his adversary should happen to appeal to me as tribune, whether to interpose my authority, or, by a kind of resignation of my office, to act solely in my private capacity. For these reasons I rather chose to officiate as the public magistrate than the private advocate.'

The letters contain frequent references to cases in the Centumviral Court, which appears to have been in constant activity throughout this period. There are references to the Court in I, 5; II, 14; IV, 16; IV, 24; V, 21; VI, 12 and VI, 33. In VI, 12 addressed to Fabatus, his wife's grandfather, he says: 'Be assured, therefore, I shall give all the assistance in my power to Vectius Priscus, especially in what relates to my peculiar province, I mean the Centumviral Court.'

The most vivid and interesting of Pliny's cases before the Centumviri is that described in a letter to his friend Romanus (VI, 33):

'Figure to yourself a lady, of high birth and married to a person of praetorian rank, suing for her patrimony in the Centumviral Court, having been disinherited by her octogenarian father within eleven days after this amorous old man had introduced a stepmother to his daughter. Imagine the solemnity of a court, composed of one hundred and eighty *iudices* (for that is the number of which it consisted), an immense number of supporters attending both parties; the benches thronged, and a wide circle of people encompassing the *iudices*, at the same time that numbers pressed round the tribunal; even the galleries lined with men and women, leaning over with the greatest earnestness (who, though they might see tolerably well, it was scarce possible for them to hear a word); represent to yourself, in short, fathers, daughters, and step-mothers, all warmly interesting themselves in the event of this important trial. The opinions of the judges were divided, two of the sections being for us and two against us. It is somewhat remarkable that the same question, debated before the same judges, and pleaded by the same advocates, and at the same time, should lead to such divergent decisions, by chance which did not appear to be the result of accident. In the event, the step-mother, who claimed under the will a sixth part of the inheritance, lost her cause. Suberinus (the son of the step-mother) also was defeated, who, though he had been disinherited by his father and had not dared to vindicate his own patrimony, had yet the singular assurance to claim the effects of his step-father.'

Many of these causes tried before the Centumviri appear to have attracted extraordinary public interest. In Cicero's De Oratore (I, 39; II, 32) we are told of a case—*Coponius against Curius*—also raising a question as to the legal validity of a will, which excited a widespread interest similar to that evoked by the case described above by Pliny. It was argued for the plaintiff by Scaevola, the most eminent jurist of the day, and for the defendant by Crassus, who was regarded as the most accomplished orator of the age. It need hardly be said that with a tribunal like the *centumviri* the orator was successful. The case is of great interest to us as raising a question of law analogous to that involved in the leading English case of *Ackroyd* v. *Smithson*.

In a letter to Cornelianus (VI, 31) we have a fairly full account of proceedings in a meeting of the Emperor's Council under Trajan to which Pliny had been summoned. The business consisted in the hearing of a charge of disaffection

against an Ephesian noble which was proved to be without foundation, the punishment of a centurion who had been guilty of adultery with the wife of a high official, and also of the peccant lady, and the investigation of a charge of forging a will brought against one of the Emperor's freedmen, which was also held to be unfounded. In two other letters (IV, 22, to Rufus; VI, 22, to Tyro) Pliny mentions that he had been acting as assessor in judicial business in which the Emperor himself presided. In VI, 11 (to Maximus) we are informed that he has been acting as an assessor to the *Praefectus Urbis* in cases coming before that official.

In VI, 2 (to Arrianus) there are some very sound observations on the attitude which a judge should observe towards those pleading before him: 'As for myself, whenever I act as *iudex* (which is more often than I plead) I always give the advocates as much time as they desire, for I look upon it as presumptuous to pretend to guess, before a cause is heard, what time the discussion will require, and to set limits to the examination of a question before one is acquainted with its full extent; especially as the first and most sacred duty of a judge is patience, which, indeed, is itself a considerable part of justice.' It would be well if this advice were followed by some members of the English Bench, particularly in the County Courts.

In the correspondence with the Emperor Trajan (Bk. X of the Letters) are found frequent references to matters regarding status, more especially as to the conferring of the privilege of Roman citizenship—(*civitas*)—or the less extensive rights involved (at that period) in the *ius Quiritium*. Thus in letter 108 of the Trajan correspondence (Trajan to Pliny) we find: 'I have read the petition of P. Accius Aquila, captain of the 6th equestrian cohort, which you sent me; and, acceding to this request, I have conferred upon his daughter the Roman citizenship.'

In letter 105, Pliny writes to the Emperor: 'Valerius Paulinus having bequeathed to me the patron's right over all his freedmen except one, I beg of you to grant the citizenship to three of them. To desire you to extend this favour to all of them, would, I fear be too unreasonable a trespass upon your indulgence. . . . The persons for whom I make this request are C. Valerius Aestiaeus, C. Valerius Dionysius and C. Valerius Aper.' Trajan replies (106): 'You act in a most worthy manner by consulting the interest of those persons whom Valerius Paulinus has confided to your trust; I cannot, therefore, but encourage you, as far as depends upon me, to lose no time for that purpose. I have accordingly granted citizenship to such

of his freedmen as you requested, and have directed the patent to be registered. I am ready to confer the same on the rest whenever you shall desire me so to do.'

It will be remembered that by the *Lex Papia Poppaea* the patron, in case of freedmen possessed of over 100,000 sesterces, had certain rights of succession, even preferential to children where the freedman had not the *ius liberorum*. These provisions together with Justinian's amendment of the law are set out in the Institutes III, 7, 2 and 3.

Again in letter 6 (to Trajan) we read: 'Having been attacked last year by a severe and dangerous illness, I employed a physician, whose care and diligence I cannot sufficiently reward but by your gracious aid. I entreat you, therefore, to grant him the privilege of citizenship, for, as he is the freedman of a *peregrinus*, he is, consequently, himself a *peregrinus*. His name is Harpocras. I further beg of you to bestow the full privileges of a Roman citizen upon Helia and Antonia Harmeris, the freedwomen of Antonia Maximilla, a lady of great merit. It is at her desire I make this request.' The consent of the patroness was, of course, usually necessary before the citizenship could be conferred, as her private rights over the freedwomen would be affected prejudicially. In letter 7 we find the requests contained in the last letter have been granted.

In letter 10 there are several requests for the grant of citizenship in either a complete or modified form. 'In my late indisposition I was greatly indebted to Posthumius Marinus, my physician; and I cannot make him a suitable return save by the aid of your gracious favour. I entreat you, therefore, to make Chrysippus Mithridates and his wife, Stratonica, (who are related to Marinus), citizens of Rome. I beg, likewise, the same privilege in favour of Epigonus and Mithridates, the two sons of Chrysippus, but with this restriction, that they remain under the power of their father and yet preserve their right of patronage over their own freedmen. I entreat you also to grant the full privileges of a Roman citizen to L. Satrius Abascantius, P. Caesius Phosphorus and Pancharia Soteris. This request I make with the consent of their patrons.'

The granting of the citizenship to Chrysippus would not, without express provision, have entitled him to *patria potestas* over the children born before the grant. So this is expressly provided. On the other hand, the preservation of their rights of patronage as part of their *peculium* is also expressly provided for; otherwise on acquiring the *potestas*, the *pater* (Chrysippus) would have been entitled to them.

The *ius trium liberorum*, introduced by the Lex Papia, conferring various legal advantages on persons who had three children living, had in the time of Pliny become a special privilege which was conferred by imperial grant without any necessary reference to the procreation of children. An instance of the grant implying a lack of sense of humour on the part of the imperial authority was to the Temple of Diana at Ephesus (cf. Ulp. 22, 6). In a letter to Fabatus (VII, 16) Pliny mentions that Calestrius Tiro, his friend, had attained the tribunate before him by reason of having the privilege given to those who have three children. In a letter to Trajan (X, 2) he returns thanks for having had the privilege conferred on himself and in a letter addressed to Priscus (II, 13, possibly Neratius Priscus, the jurist) he states that he had lately obtained for his friend Voconius Romanus 'the privilege granted to those who have three children; a privilege which, though Caesar very rarely bestows it, and always with great caution, yet he conferred, at my request, in such a manner as to give it the appearance and grace of being his own choice.'

There are some interesting illustrations of the law of the time relating to the manumission of slaves. In a letter to Fabatus, the grandfather of his wife, Calpurnia (VII, 16), he informs the latter that a friend and former colleague of his, Tiro, who has been appointed proconsul of Boetica, will pass through Ticinum on his way to his province, and that there will be an opportunity of manumitting formally (by *vindicta*) and so conferring on them the full private rights of citizenship, certain slaves of Fabatus to whom the latter had already given liberty by informal manumission *inter amicos*, which gave them only the status of Junian Latins—'Si voles *vindicta* liberare, quos proxime *inter amicos* manumisisti.'

In a letter to Statius Sabinus (IV, 10) acknowledging a letter from his correspondent in which he informs Pliny that they have been appointed co-heirs in the will of Sabina (probably some relative) and requesting his opinion on the validity of a legacy to a slave of the testatrix, named Modestus, Pliny points out that the legacy was void as there had been no express gift of freedom to the slave in the will. (It was not until Justinian's legislation that a gift of liberty was implied in such a case.) He nevertheless strongly urges on Sabinus the carrying out of the wishes of the deceased and the giving of his freedom and the legacy to Modestus. 'I have consulted the *prudentes* and they all agree that Modestus is not entitled to his liberty, since it is not expressly given; nor to the legacy as the testatrix has given

it to her slave. But it appears to me a clear mistake on the part of the testatrix; and, therefore, I think we ought to act, in this case, as if Sabina had directed in so many words, what it is clear she thought she had ordered. I am persuaded you will join with me in this opinion, who so religiously regard the will of the dead; which indeed, where it can be discovered, will always be law to an honest mind. Honour is to you and me as strong an obligation as the compulsion of law is to others. Let Modestus then enjoy his freedom and his legacy, in as full a manner as if Sabina had observed all the requisite forms.'

With reference to the law concerning the acquisition and transfer of property, there are a number of indirect allusions, but two passages may be cited as throwing some light on the conveyancing practice of the time.

In a letter to Trajan (X, 4), in which Pliny petitions the Emperor to promote his friend Voconius Romanus to Senatorial rank and states that the mother of Romanus had fulfilled an undertaking she had entered into by providing her son with the necessary property qualification, we have a reference to the use of *mancipatio* in conveyance. 'Nam et fundos emancipavit et cetera, quae in emancipatione implenda solent exigi, consummavit' (For she has mancipated the estates and completed all the formalities which are usually required in the case of mancipation).

It has been suggested that after the Publician Edict (towards the end of the Republican era) the *mancipatio* as a mode of conveyance rapidly went out of use and that it was superseded in pactice by a written document, examples of which are to be found in Bruns (Fontes) and Girard (Textes). But it seems clear from this and other instances in the Roman writers that the old forms persisted, at any rate in the classical age. Professor Buckland (Text Book, p. 238) says: 'There seems no reason to doubt that throughout the classical age *mancipatio* retained its ceremonial, though it is possible that this was at times neglected and people were content not to go behind the written document.'

In a letter to Caninius (VII, 8) there are some useful suggestions as to the best method of making a settlement of property so that the income may be devoted to charitable or other public purposes. 'You ask my advice in what manner you shall settle the sum of money which you have presented to our fellow citizens of Comum for an annual festival, so as to secure the just application of it after your death. Your inquiry does you honour, but the answer is not easy. . . . Upon the whole I can

think of no method more eligible than what I myself adopted in a like case. Intending to give 500,000 sesterces for the maintenance of children who were born of good families, I made a fictitious mancipation to a public agent (*actori publico*) of land which was worth considerably more, who reconveyed it to me, charged with a yearly rent of 30,000 sesterces. By this means the principal was secured to the community, at the same time that the interest was certain, and the land itself (as it was of much greater value than the rent charged upon it) was always sure of finding a tenant.'

It is, however, in connexion with the law affecting wills that the Letters are particularly valuable in affording illustrations of practical application. In a letter addressed to Calvina, a relation by marriage (II, 4), there is an indication of the difficulties of an heir instituted to an inheritance which may prove insolvent. In this case Pliny advises her to enter upon the inheritance and so to protect her father's memory from the reproach of dying insolvent (famam defuncti pudoremque suscipere). He points out that the other creditors having been paid, he is the sole creditor and that he gives a release (acceptum tibi ferri iubeo) from whatever was owing to him by her father.

In the letter addressed to Pliny's kinsman, C. Plinius Calvisius (V, 7), there is a very interesting example of an attempt to give a legacy to the municipality of Comum (Como). A testator of the name of Saturninus had instituted Pliny as his heir and bequeathed a fourth of his estate (*quadrantem*) to the municipality, afterwards altering the bequest to a legacy of 400,000 sesterces, the legacy apparently being in the form *per praeceptionem*. Pliny points out that a municipality is not capable of being instituted heir or of receiving legacies, at any rate given in the form *per praeceptionem* (Nec heredem institui nec praecipere posse rempublicam constat). Nevertheless he has decided to carry out the wishes of the testator. 'This bequest, regarded from the legal point of view, is void (*irritum*), but looking to the intention of the deceased is definite and binding. Now, to me (though I fear the lawyers will not concur in what I am about to say) the wish of the deceased is of greater authority than any law, especially in a case where he intended to benefit our own community.'

Apparently the date of the letter is before the reign of Nerva, probably in the time of Domitian, as we are informed by Ulpian (24, 28) that Nerva authorized all *civitates* to receive legacies and that a *senatusconsultum* of Hadrian's reign made careful regulations on the subject. They could not, however,

except as a special privilege, be instituted *heredes* until the later Empire (Buckland, Text Book, p. 178).

In a letter to Annianus (II, 16) reference is made to the invalidity of a codicil not confirmed by will. The law on this point, however, was altered soon after Pliny's time (see Inst. II, 25. 2, and Buckland, p. 350). 'You act agreeably to your usual concern for my interest, when you advise me to consider the codicil of Acilianus (who has appointed me one of his co-heirs) as void, because it is not confirmed by his will. That the law in this case deems it invalid, I well know; and it is a point of jurisprudence to which even those who are ignorant of every other are usually no strangers. But I have a law of my own, which I shall always religiously observe; and that is, punctually to perform the will of the dead, though it may want the essential forms. This codicil, beyond all manner of doubt, is in the handwriting of Acilianus; therefore, though it is not confirmed by his will, I shall be guided by it as strictly as if it were; especially as there is no danger that any villainous informer can take advantage of this mistake.'

In a letter to a friend, Severus (V, 1), Pliny expresses his satisfaction in having received a small legacy from a certain Curianus, regarding it as a testimony to the rectitude of his action in connexion with a dispute which had arisen over the will of the mother of Curianus, who had disinherited her son and made Pliny and others heirs under her will. To the law student the account Pliny gives of the affair is of the greatest interest as bringing into relief some of the leading rules with regard to the making of wills. His narrative is as follows:—

'Pomponia Galla, having disinherited her son, Assidius Curianus, appointed me, and Sertorius Severus, of praetorian rank, together with several eminent Roman knights, her co-heirs. The son applied to me to give him my share of the inheritance, in order to use my name, as an example to the rest of the joint heirs; but offered, at the same time, to enter into a secret agreement with me to return my proportion. I told him it was by no means agreeable to my character to seem to act in one way, when I was really acting in another; and there was something of meanness in making presents to a man of his fortune, who had no children; besides, it would not at all answer the purpose he had in view. Indeed (I added) if I were to withdraw my claim, it might be of some service to him; and this I was prepared to do, if he could prove to me that he was unjustly disinherited. "Let me prevail with you, then," said he, "to be my arbitrator in this case." After a short pause, I told him

I consented; "for why," said I, "should I not have as good an opinion of my own impartiality as you appear to have? But remember I am not to be prevailed upon to decide the point in question against your mother, if it should appear she had just reason for what she had done." "Be it as you wish," he replied, "which I am sure is always to act equitably." I called to my assistance Corellius and Frontinus, two of the most able jurists which Rome at that time afforded. Attended by those friends, I heard the cause in my chamber. Curianus said everything which he thought could favour his pretensions, to whom (as there was nobody but myself to defend the character of the deceased lady) I made a short reply; after which I retired with my friends to deliberate upon the case; and then returning, acquainted Curianus that it was our opinion that his conduct had justly drawn upon him his mother's displeasure. Some time afterwards Curianus commenced a suit in the Centumviral Court against all the co-heirs except myself. The day fixed for the trial approaching, the rest of the co-heirs were desirous of making a compromise; not out of any diffidence in their cause but from a distrust of the times. They were apprehensive that what had been the case of many others might happen to them, and, from a civil suit, it might end in a criminal process; as there were some amongst them whom the friendship of Gratilla and Rusticus [Rusticus had been put to death and Gratilla, his wife, banished by the Emperor Domitian] might prove extremely prejudicial, they therefore desired me to talk with Curianus. Accordingly I had conference with him in the Temple of Concord. "Suppose," said I, "your mother had left you the fourth part of her estate, or even suppose she had made you sole heir, but had exhausted so much of the estate in legacies, that there would not be more than a fourth part remaining to you, could you justly have complained? You ought to be contented, therefore, if, being absolutely disinherited, as you are, the heirs are willing to relinquish to you a fourth part; which, however, I will increase by contributing my proportion. You know you did not commence any suit against me; so that *usucapio* has run in my favour, two years having now elapsed. But, to induce you to agree to the proposals on the part of the other co-heirs, and that you may not suffer by the peculiar respect you shew me, I offer to advance my proportion with them." '

In one of the letters in the Trajan correspondence (X, 79), written during the period of Pliny's governorship of Bithynia, there is an example of a *fideicommissum* of a kind, which,

judging by the context, must have been not uncommon at the period. Pliny informs the Emperor that a certain Julius Largus of Pontus, whom he remarks he had not seen or even heard of, had instituted him heir in his will with a request that he would adiate the inheritance in due form (hereditatem suam adirem cerneremque) and after deducting 50,000 sesterces for his own use (apparently a legacy *per praeceptionem*), hand over the residue to the cities of Heraclea and Tios, to be devoted to certain public purposes in honour of Trajan, as Pliny should determine.

If the limits of space allowed, it would be possible largely to supplement the number of these extracts. Scattered through the pages of the Letters are not only relations of legal transactions, but casual allusions to many matters which greatly aid in making us familiar with Roman Law and lawyers. Two examples, taken at random, must suffice. In VII, 24, Pliny incidentally mentions that the house of Cassius, the chief of the Cassian school (*i.e.* C. Cassius Longinus, who succeeded Sabinus as the head of the Sabinians or Cassians) has recently come into the possession of Quadratus, a direct descendant of Cassius, a young man for whom Pliny had a great regard and esteem. In a letter to his friend Romanus (VI, 15) we are given an account of a humorous incident regarding Javolenus Priscus, the jurist, concerning whom Pliny remarks, 'interest tamen officiis, adhibetur consiliis atque etiam *ius civile publice respondit.*' [For a lucid comment on this letter, see Roby's Introduction to the Digest, p. 159.] It is interesting to meet one of those *quibus permissum est iura condere* in the flesh, taking part in a social party, although he appears to have attempted a legal witticism which neither Pliny nor the other members of the party appear to have understood.

THE DOMINIONS AND THE UNITED KINGDOM.[1]

G. Godfrey Phillips.

THE relationship between the Dominions[2] and the Crown and the Imperial Parliament presents questions of great difficulty. At the present time the Dominions are, just as the Colonies, subject to the legal—though not to the political—supremacy of the Imperial Parliament, the Parliament of the United Kingdom. Though this supremacy has for many years not been exercised positively, *i.e.* by the passing of Acts affecting a Dominion, except at the request of such Dominion, *e.g.* at the request of Canada to amend the British North America Act, 1867, yet it still exists, inasmuch as there are in force Acts of the Imperial Parliament (especially the Acts creating the Dominion Constitutions) which apply to the Dominions, and the courts would be compelled to hold any Dominion legislation conflicting with such Acts to be inoperative.

Also the rights of the Crown in relation to the Dominions, *e.g.* the appointment of Governors-General and the conclusion of treaties, have until very recently been exercised on advice given by the Imperial Government, the Government of the United Kingdom, though such advice has been given only after consultation with the Dominion concerned and with its concurrence.

While, however, the strict legal status of the Dominions has remained unchanged, their political status has altered with extreme rapidity, largely owing to their participation in the War of 1914—1919 and the subsequent negotiations for a world settlement. Responsible government in the Dominions dates from the Durham Report of 1839, which was followed by instructions to the Governors of Upper and Lower Canada that they should act on the advice of Ministers acceptable to representative Legislatures. There followed the grant of responsible government to

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[1] This article, which forms a chapter of 'Constitutional Law,' by E. C. S. Wade and G. Godfrey Phillips, is reproduced by permission of the publishers, Messrs. Longmans, Green & Co. Ltd.

[2] The term 'Dominion' is used for Self-Governing Dominion, except where spelt with small 'd.'

the other great Colonies, Newfoundland, New South Wales, Victoria, South Australia, New Zealand, Queensland, the other Provinces of Canada and the South African Colonies. In each case a relaxation of Imperial control followed the grant of responsible government. But just as responsible government was granted without being formally embodied in the several colonial constitutions, so the formal legal supremacy of the Imperial Parliament has remained unfettered, although in practice the Self-Governing Dominions have for long exercised complete internal sovereignty.

Since 1887 there have been periodic conferences for the purpose of consultation between the Governments of the Empire. The Imperial Conference of 1926 realized that the disparity between the legal status of the Dominions and political reality was too great to last. The Dominions had obtained the right to make separate treaties with foreign Powers in the name of the Crown without the participation of the Imperial Government or Parliament, except in regard to the issue of full powers and to instruments of ratification. It had been recognized that the Canadian Government could appoint a separate Minister to represent them diplomatically at Washington,[3] and in 1924 the Irish Free State appointed an Irish Minister to the United States.[4] The Dominions are independent members of the League of Nations. It was abundantly clear that the old forms did not correspond to existing facts. The Imperial Conference of 1926 made the following declaration: The United Kingdom and the Dominions are 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.' The declaration added this rider: 'But the principles of equality and similarity appropriate to status do not universally extend to function. Here we require something more than immutable dogmas.'[4a]

A Conference was set up to consider how far legal forms should be changed and brought into line with this declaration. That Conference reported in 1929.[5] This Report has been adopted with minor alterations by the Imperial Conference of 1930 and if the resolutions of that Conference are put into effect

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[3] Such an appointment has since been made.

[4] Other Dominion diplomatic representatives have since been appointed.

[4a] Imperial Conference, 1926; Summary of Proceedings (1926, Cmd. 2768).

[5] Report of the Conference on the Operation of Dominion Legislation and Shipping Legislation, 1929 (1930, Cmd. 3479).

there will be a radical change in the formal legal status of the Dominions.[5a]

It will be convenient to examine the existing limitations upon Dominion autonomy and to consider how each in turn is affected by the proposals of the Imperial Conference.

The Imperial Parliament possesses the right to legislate for all parts of the King's dominions. By section 2 of the Colonial Laws Validity Act, 1865, any colonial law (and colony includes the Self-Governing Dominion) which is repugnant to an Imperial Act is to that extent inoperative. It was at one time thought that the Acts of Colonial Legislatures were void if repugnant to English Common Law, but this doctrine was shown to be incorrect: *Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1. To remove any doubts it was expressly enacted by section 3 of the Colonial Laws Validity Act that no colonial law shall be deemed to have been void or inoperative on the ground of repugnancy to the Law of England, unless the same shall be repugnant to the provisions of some Act of Parliament extending to the colony. The Imperial Conference of 1930 did not propose to abolish the legal supremacy of the Imperial Parliament, but it did propose changes in the law which, with certain exceptions which will be discussed later, will render it inoperative. In law the Imperial Parliament cannot abolish its own legal supremacy, but by convention it can restrict the power to exercise it to a vanishing point. It is proposed:

(1) That the Colonial Laws Validity Act, 1865, shall cease to apply to any law made by the Parliament of a Dominion.

(2) That no Dominion law shall be void or inoperative on the ground of repugnancy to an Act of the Imperial Parliament. The doctrine of repugnancy will still apply to Provincial legislation in Canada and State legislation in Australia.

(3) That Dominions shall have power to repeal or amend Acts of the Imperial Parliament, in so far as they are part of the law of the Dominion.

(4) That it shall be placed on record by Statute of the Imperial Parliament that no Act of Parliament of the United Kingdom passed hereafter shall extend to a Dominion as part of the law in force in that Dominion, unless it is expressly declared that the Dominion has requested and consented to the enactment thereof.

(5) That the term, 'Colony,' shall no longer include

[5a] Imperial Conference, 1930; Summary of Proceedings (1930, Cmd. 3717).

> Dominion. The expression, 'Dominion,' means Canada, Australia, New Zealand, the Union of South Africa and the Irish Free State.[6]

It is suggested that the Statute to be passed to embody these changes shall be called 'The Statute of Westminster.'[7]

The Imperial Conference realized that, unless and until general opinion in the Dominions desired its abolition, it was important to preserve the legal supremacy of the Imperial Parliament, in so far as it safeguards State and Provincial rights in Australia and Canada. Before considering the proposals of the Conference on this question, there must be considered the existing powers of Dominions to alter their Constitutions. Such powers depend upon the terms of the Imperial Act creating the Constitution. The Constitution of Canada depends upon the British North America Act, 1867, and can only be amended by Act of the Imperial Parliament, though any such Act would be passed on the request of the Dominion Parliament, provided that no Province objected. The unalterable form of the Canadian Constitution is due to its early date and the strong local feeling of the Province of Quebec. The Commonwealth of Australia Act, 1900, provides an elaborate machinery by which the Constitution may be changed. There is needed the assent of both Houses of the Commonwealth Parliament and of the electorate. State rights cannot be diminished without the consent of a majority of the voters in the State concerned. In the case of the Union of South Africa, where the Provinces are of relatively small importance, there are very wide powers of change, though Bills effecting certain constitutional changes must at present be reserved for the pleasure of the Crown to be expressed. The Constitution of New Zealand can be amended freely with certain limitations which do not call for special discussion. The Constitution of the Irish Free State was enacted as the result of an Agreement[8] between the United Kingdom and the Irish Free State in 1921. It can be freely amended, provided that such amendments do not conflict with the Articles of the Agreement, as subsequently enacted.[9] The Imperial Conference of 1930 proposed that the projected Statute of Westminster and the repeal of the Colonial Laws Validity Act should not be deemed to confer

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[6] It appears that the proposed changes will not immediately apply to Newfoundland. Newfoundland possesses a Legislature founded on Letters Patent of great antiquity. It is not possible to state precisely the constitutional basis of the relations between Newfoundland and the Imperial Parliament.

[7] It is proposed that the Statute shall become operative on December 1, 1931, for such Dominions as approve the proposed changes.

[8] See *infra*.

[9] See p. 173, *infra*.

any power to repeal or alter the Constitutions of Australia or New Zealand, otherwise than in accordance with the existing law. No decision has been taken as to whether or not it should be made easier to amend the Canadian Constitution, and no decision will be taken until the Provinces have been consulted. The first eight sections of the Commonwealth of Australia Act, 1900, which form a preface to the Constitution and make it clear that the basis of the Constitution is federal, cannot be amended or altered except by Act of the Imperial Parliament. The basis of this view is that the Constitution itself, which can be amended by the machinery described above, is scheduled to these eight sections of the Act, and that the machinery for change only applies to the scheduled Constitution. Just as the machinery for amendment of that Constitution can only be altered by an Act of the Imperial Parliament, so such an Act is requisite to repeal sections 1—8 from which the Constitution itself draws its force. It is not proposed to make it possible to repeal these sections, unless, and until, the Federal and State Governments in Australia request it. If, and when Canada and Australia desire further powers to amend the Constitution it would seem that such powers can only be conferred by Act of the Imperial Parliament.

Further limitations upon Dominion autonomy have been: (1) the power of the Governor-General of the Dominion, as the representative of the Crown, to refuse his assent to legislation, or to reserve legislation for the assent of the King, which assent has hitherto been given or withheld on the advice of the United Kingdom Government, and (2) the power of the Crown to disallow legislation, even after it has received the Governor-General's assent. These powers have received statutory expression and vary from Dominion to Dominion. Reservation of certain Bills is in some cases compulsory by statute. These powers have been seldom exercised. Their main purpose was to make it possible for the United Kingdom Government to intervene where grave Imperial interests were concerned. The Imperial Conference of 1930 has laid it down that advice can only be given to the Crown on Dominion matters by the Ministers of the Dominions concerned, and that it would be improper for the United Kingdom Government to advise the Crown on reserved Bills. It is proposed that legislation should be introduced to abolish the powers of disallowance and reservation, if any Dominion requests such legislation. These proposed changes will not affect the right of the Crown to disallow Provincial or State legislation in Canada and Australia respectively, and there will be no interference with the direct relationship between the

States of Australia and the Imperial Government in respect of disallowance and reservation.

Yet a further limitation upon Dominion legislation has been the rule that, though supreme within the spheres allotted to them, Dominion Legislatures are confined to legislating for the peace, order and good government of their own territories. Dominion Legislatures cannot legislate with extra-territorial effect. In *Macleod* v. *Att.-Gen. of New South Wales* [1891] A. C. 455 [10] it was held by the Judicial Committee of the Privy Council that the appellant could not be punished under a Colonial Act for bigamy committed in the United States of America. It was indicated in *Nadan* v. *The King* [1926] A. C. 482 [10] that a provision of the Canadian Criminal Code attempting to limit the right of the Crown in Council to grant special leave to appeal in criminal cases was void, among other reasons, as being an attempt to legislate extra-territorially. The Imperial Conference of 1930 proposed that an Act of the Imperial Parliament should be passed giving power to the Dominions to legislate extra-territorially.

The position of the Governor-General of a Dominion is of considerable importance in inter-Imperial relations. The assent of the Governor-General is required for all legislation of the Imperial Parliament. The Governor-General in the past received his instructions from the Crown acting on the advice of the Imperial Government,[11] but now these instructions are prepared on the advice of Dominion Ministers. The Governor-General was formerly the channel of communication between the Dominions and the Imperial Government. The Imperial Conference of 1926 expressed the view that the Governor-General must be regarded solely as the King's representative, and not in any way as the representative of the Imperial Government. There is now direct communication between Dominion Governments and the Government of the United Kingdom, and the Dominions are represented in London by High Commissioners. Similarly the British Government may (and in Canada and South Africa already has done so) appoint High Commissioners in the Dominions. The Imperial Conference of 1930 recommended that a High Commissioner of the Dominions should have precedence in England after Secretaries of State. The High

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[10] Though these cases are commonly cited in support of the general proposition of the limited powers of Dominion Legislatures, they were both decided on narrower grounds. The limitation depends upon the express or implied words of the Imperial statutes creating the Dominion Legislatures, and not upon any general principle.

[11] Through the Dominions Office.

Commissioner recently appointed by the Imperial Government to represent it in South Africa has been made High Commissioner of South Africa responsible for the supervision of Basutoland and the native Protectorates of Bechuanaland and Swaziland. This office had hitherto been held by the Governor-General of South Africa.

The Governor-General is expected to act in relation to the administration of public affairs on the constitutional practice regulating the exercise of the powers of the Crown in the United Kingdom. He should be kept informed of all political affairs. The Governor-General is appointed by the Crown. The Imperial Conference of 1930 has placed on record the view that, in making such appointments, the Crown should in the future act solely on the advice of the Ministers of the Dominion concerned. Whether or not the existing practice of appointing distinguished Englishmen to the post of Governor-General will in general be continued will depend upon the sentiments of the people of the Dominions. Since the Imperial Conference of 1930 in Australia, Sir Isaac Isaacs has been appointed Governor-General of Australia on the recommendation of the Commonwealth Government, apparently without previous formal consultation with the United Kingdom Government, while the Earl of Bessborough has been appointed on the advice of the Canadian Prime Minister to the Governor-Generalship of that Dominion.

The adoption of the recommendations of the Imperial Conference of 1930 will make even more difficult than at present the task of defining the legal status of the British Commonwealth. The Dominions and the rest of the Commonwealth will still be united by the tie of common allegiance to the Crown. It is agreed that no change should be made in the Royal Title without the consent of the whole Commonwealth. It has been seen that the legal supremacy of the Imperial Parliament is still operative. The very fact that its legislative power is to be invoked to give effect to the recommendations pre-supposes its reality. Apart, however, from the limitations imposed on constitutional amendment in the interest of Provincial or State rights in Canada and Australia, there will remain no practical limitations upon Dominion autonomy in inter-Imperial relations. It is manifest that the position might give rise to insuperable difficulties, if legal rights were pressed to their logical conclusion. The unity of the Commonwealth under the Crown is not, and never has been, a mere personal union under one King, as was the union between Great Britain and Hanover. The Crown is one and indivisible throughout the Commonwealth: *Williams* v. *Howarth*

[1905] A. C. 551. It may be that the Crown, which in affairs concerning a Dominion will in future be advised only by Dominion Ministers, will be advised to take contrary actions by the Ministers of different parts of the Commonwealth.

Have Dominions the legal right to secede from the Commonwealth? The Irish Free State, though possessing almost complete power of constitutional amendment, is bound by the agreement known as the 'Articles of Agreement for a Treaty between Great Britain and Ireland' which received statutory effect in the Irish Free State (Agreement and Constitution) Acts, 1922, passed by the Parliament of the United Kingdom, and the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922, passed by the Free State Assembly. It cannot, therefore, secede without a breach of these obligations. No power will at present be given to Canada to amend the British North America Act, 1867, or to Australia to amend the preamble to the Commonwealth of Australia Act.[12] Complete powers of constitutional amendment will, however, clearly be given as soon as general opinion in the Dominion concerned demands them. The legal supremacy of the Imperial Parliament is preserved to safeguard Provincial or State rights and as a measure of ultimate co-ordination, and not to maintain authority over the Dominions. The Parliaments of the Dominions must in future be regarded not as subordinate law-making bodies, but, as in practice, co-ordinate with the Imperial Parliament. Secession, however, involves more than constitutional amendment. It can only be said that secession is altogether outside the law. It could be effected only by a declaration of independence followed by a treaty or some form of resignation. In practice, no Dominion could be kept by force within the Commonwealth. The altering of legal forms to correspond with present usage will not give to the Dominions a legal right to secede, inasmuch as secession would be an extra-legal act. Equally, secession could certainly not be prevented by any attempt to preserve the legal supremacy of the Imperial Parliament, as it used to exist.

Even less capable of definition is the status of the Dominions in International Law, with which is closely connected the problem of reconciling autonomy with the general conduct of foreign affairs by the Imperial Government. Although normally employing the British Ambassadors as their diplomatic representatives, the Dominions may appoint their own Ministers to foreign countries. The Imperial Conference of 1930 has

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12 Sections 1—8.

expressed the hope that, except where such separate appointments are made, the existing diplomatic channels, *i.e.* common action through the Imperial Government, will continue to be used. Where Dominion Governments, in cases of urgency, address communications direct to a British ambassador on matters of general concern, it is desired that there shall be a simultaneous communication made to the United Kingdom Government. It is realized that at present the United Kingdom Government must still remain primarily responsible for general foreign affairs; this is an instance of equality of status, but dissimilarity of function. On matters of purely Dominion concern there will be direct communication between Dominions and British ambassadors with no obligation to inform the United Kingdom Government. Dominion Governments may in relation to their own Dominion make agreements with foreign Governments, and, further, may advise the exercise of the Crown's treaty-making prerogative powers. Where treaties are made in the name of the Crown on behalf of the whole Commonwealth, a United Kingdom plenipotentiary will sign on behalf of Great Britain and Northern Ireland, and all parts of the British Empire which are not separate members of the League of Nations: separate plenipotentiaries will sign for each separate Dominion. While recognizing the special functions of the United Kingdom Government in foreign affairs, stress is laid on the vital importance of frequent consultation on matters of common interest. As far as inter-Imperial obligations are concerned, it is clearly understood that no Dominion will be bound by a treaty made in the name of the Crown to which it has not assented, and which it has not ratified.

It will be seen that, as between the United Kingdom and the Dominions, full equality and practical independence in international relations are freely recognized. Inter-Imperial declarations do not, however, in themselves alter International Law or bind foreign States. The Dominions are independent members of the League of Nations and of the Court of International Justice. The crux of the matter, however, lies in War and Neutrality. War is declared by the Crown. It is improbable that foreign States would recognize the neutrality of a British Dominion when the Crown declared war.[13]

Enough has been said to show how difficult are the problems created by an attempt to combine legal autonomy with union under one Crown in one Commonwealth. It is clear, however,

[13] Cf. Oppenheim's 'International Law' (Longmans) (4th ed.), by A. D. McNair, vol. i, at p. 194.

that there will still be room for conventions and gradual development in the sphere of inter-Imperial relations. The abolition of legal forms will render still more necessary, if real unity is to be preserved, the building up of machinery for frequent consultation and co-operation on all questions of general concern, whether imperial or foreign. A useful recommendation made by the Imperial Conference of 1930 is the formation of a Commonwealth Tribunal for the settlement of justiciable disputes between members of the Commonwealth. It is not intended to establish a permanent court, but that there shall be standing panels of eminent jurists of the Commonwealth, from which, in the event of a dispute, an *ad hoc* arbitration tribunal can be selected.

FRAUD AND THE STATUTES OF LIMITATIONS.

John Brunyate.

THE recent case of *Lynn* v. *Bamber*[1] has revived an interesting and undecided point upon the Statute of Limitations and has given McCardie J. an opportunity of exploring with his usual thoroughness a somewhat difficult region of law. In *Lynn* v. *Bamber* the plaintiff bought from the defendant young plum trees warranted to be 'Purple Pershores.' Some years later, on their bearing fruit, he found them to be 'Coe's Late Red,' a cheaper sort of plum. He sued the defendant for damages for breach of warranty and, as his suit was brought more than six years after he had bought the trees and would *prima facie* be barred by the Statute of Limitations, 1623, he alleged that the defendant had fraudulently misrepresented to him the nature of the trees and had fraudulently concealed from him the breach of warranty. McCardie J. found on the facts that fraud was not proved and that therefore the Statute of Limitations was a good defence, but held in a long and interesting judgment that if fraud had been proved the Statute of Limitations would have been excluded.

There is no doubt that in a Court of Equity before the Judicature Act a reply alleging that the cause of action was based on fraud or fraudulent concealment was in most cases a good reply to the Statute of Limitations, but the principles on which the Court acted are not entirely clear. It is still a question how far concealment is an essential part of the reply and it is a very doubtful point whether the reply would have been successful in a Court of Law before the Judicature Act or can now be raised in any action which before the Judicature Act could only have been brought in a Court of Law. In this article I propose to examine how the reply of fraud or fraudulent concealment arose and, so far as possible, what is its present application. To do this it will be necessary to inquire into the way in which the Statutes of Limitations were applied in Courts of Equity, for it will, I think, appear that some of the recent difficulties have arisen from a misunder-

[1] [1930] 2 K. B. 72.

standing of the way in which the Statutes were originally applied. I shall not touch on the Real Property Limitation Act of 1833, which applies to suits relating to land, for that Act has an express exception in cases of 'concealed fraud' which has been given a special interpretation by the Courts.

The Limitations Act of 1623 provided that no actions of certain specified kinds should be brought but within specified times after the causes of action respectively accrued. In particular, it limited actions of simple contract and most torts to six years after the cause of action accrued and this limitation is still in force. The Act was defective in several respects. In particular, it made no provision for fraud, so that it would even protect a defendant who had defrauded the plaintiff so cunningly that his fraud had not been discovered for six years or who had by fraud concealed from the defendant for six years an existing cause of action. And further it was expressed to apply only to particular forms of actions—as, for example, an action of trespass or trespass on the case—all of which were common law actions; it did not therefore expressly include any suit in equity even if the suit fulfilled the same purpose as an action at law within the Statute. The Courts of Equity, however, adopted the Statute in their own proceedings, and in doing so they established the rule that in some cases, when the defendant had been fraudulent, the period of limitation would only run from the date when the fraud was discovered. It is this adoption of the Statute in equity and the equitable rule in cases of fraud that I propose to examine.

The Adoption of the Statute in Equity.

The jurisdiction of the Courts of Equity was of three sorts. Some suits, such as a suit for breach of trust, could be brought only in a Court of Equity; these formed the 'sole jurisdiction.' Others, such as a suit for damages for fraud, could properly be brought in either a Court of Common Law or a Court of Equity; these gave rise to the 'concurrent jurisdiction.' Finally, there were suits which of themselves could only be brought in a Court of Law, but in which incidental questions would be determined by a Court of Equity which had obtained jurisdiction over them because discovery, or an account, or some other special remedy had been required; these gave rise to the 'auxiliary jurisdiction.'

In 1719 in *Lockey* v. *Lockey*[2] a suit was brought in equity

[2] Prec. in Ch. 518.

to recover the profits of the plaintiff's estate which, as the plaintiff said, the defendant had received during the plaintiff's infancy. The suit was brought eight years after the plaintiff came of age and Lord Macclesfield L.C. held that the plaintiff was barred by the Act of 1623, for, as he said, the suit could only be brought in equity because discovery was required and had it been brought at law it would have been barred by the Act, and he did not consider that there was any difference between the two cases.

In 1767 in *Smith* v. *Clay*[3] Lord Camden L.C., adopting a statute which barred proceedings in error at common law after twenty years, refused to set aside a decree in equity thirty years old, although it contained a manifest error. This case was within the sole jurisdiction of equity, and Lord Camden gave a somewhat different reason from Lord Macclesfield for applying the statutory bar. He said: 'A court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. . . . But as the court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied [it] to similar cases in equity. For when the Legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation) to countenance laches beyond the period that law had been confined to by parliament.'[4]

It is instructive to compare the reasons for the decisions in *Lockey* v. *Lockey* and *Smith* v. *Clay*. Lord Macclesfield in *Lockey* v. *Lockey*, dealing with a case within the concurrent or auxiliary jurisdiction of equity, followed the Statute of Limitations on the ground that he was bound to apply, so far as possible, the substantive rules of the Court of Law of which the rule of limitation was one. Lord Camden, on the other hand, dealing with a case within the sole jurisdiction of equity, adopted the limitation analogous to that of the Statute for convenience' sake, as being a useful extension of the doctrine of equity that equity will not countenance stale claims.

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[3] (1767) Ambl. 645; 3 Bro. C. C. 639 n.
[4] 3 Bro. C. C. 639 n.

In 1806 Lord Redesdale summed up these two cases as well as others in his classic judgment in *Hovenden* v. *Annesley*.[5] The facts in that suit are very intricate and not very important. Briefly the suit was an attempt to set aside for fraud a deed of 1726, which had been the culmination of various fraudulent transactions by the predecessors of both parties between 1690 and 1726, and to recover land enjoyed by one party under that deed. Lord Redesdale said:

'But it is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely *by analogy* to the statutes; they act in *obedience* to it (*sic*). The statute of limitations, applying itself to certain legal remedies, for recovering of debts, etc., equity, which in all cases follows the law, acts on legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies: nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law. . . . I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the Legislature by statute limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also.'

Lord Redesdale here says that in certain circumstances Courts of Equity can be said to act in obedience to the Statute. He recognizes elsewhere that in other circumstances they can properly be said to act by analogy to the Statute and he draws a distinction, of which the origin can be seen in comparing *Lockey* v. *Lockey* and *Smith* v. *Clay*, between the two ways in which the Courts of Equity apply the Statute. This distinction between action in obedience to, and action by analogy with, the Statute has been adopted by later judges, some of whom, it is submitted, have given to his words a meaning which

[5] 2 Sch. & Lef. 607, 630.

Lord Redesdale did not intend.[6] The later interpretation of the distinction may be expressed thus: A Court of Equity, when it is deciding a question that might have arisen in a Court of Law (*i.e.* any question within its concurrent or auxiliary jurisdiction) is as much bound by any Statute of Limitations which would bind a Court of Law in deciding that question as it would be if suits in equity were expressly mentioned in the Statute; upon such questions the Court is said to act in obedience to the Statute; upon all others (*i.e.* upon questions within its sole jurisdiction) it acts only by analogy to it. Now it is submitted that what Lord Redesdale meant was different from this; he said that, because equity in certain matters follows the law, Parliament must have expected that in such matters equity would adopt the Statutes and that, having passed the Statutes foreseeing this result, it might be said to have intended and ordained the result.[7] The two interpretations of the distinction lead to different results upon several points. The cardinal difference in their results appears when we consider the question of fraud. On the first interpretation the Courts of Equity are bound by the Statute as firmly as they would be if suits in equity were expressly included in it and to introduce an exception in cases of fraud is to graft the exception upon the plain words of the Statute. On the second, and it is submitted the correct, interpretation the Courts of Equity, in a case of fraud that the plaintiff has not discovered in time, will act according to the well-known rule that equity does not follow the law when it would be unjust for it to do so and upon this rule will refuse to apply the Statute.

Before considering the cases on fraud we should note that, upon the second interpretation, Lord Redesdale's distinction does correspond to a real, if somewhat ill-defined, distinction of substance. There are some suits, among which are included most of those in which the Courts of Equity act in obedience to the Statutes, that are eminently fitted to be expressly subjected

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[6] See *per* Lord Westbury, *Knox* v. *Gye* (1872) L. R. 5 H. L. 656, 674; *per* Palles C.B., *Barber* v. *Houston* (1884) 14 L. R. Ir. 273; *per* Holker L.J., *Gibbs* v. *Guild* (1882) 9 Q. B. D. 59, 74; *per* Story J., in *Sherwood* v. *Sutton* (1828) 5 Mason (New Hampshire) 143, 146; and the argument of counsel referred to by Lord James of Hereford in *Bulli Mining Co.* v. *Osborne* [1899] A. C. 351.

[7] I think it will be found that Lord Redesdale's other judgments support this interpretation—perhaps even more than his judgment in *Hovenden* v. *Annesley*. In particular in *Cholmondeley* v. *Clinton* (1821) 4 Bligh 1, where the question was whether an equity of redemption could be acquired by twenty years' possession adverse to the mortgagor but not to the mortgagee, he clearly said that the Court was acting in obedience to the statute. But the question was within the sole jurisdiction of equity and, on the meaning more usually (but, it is submitted, wrongly) given to Lord Redesdale's distinction, was one on which the Court would act by analogy to the Statute.

to statutory limitation and are not subject to such limitation only because the statute law is incomplete; to these suits the Courts of Equity should, so far as is equitable, apply the Statutes of Limitations as peremptorily as they would if the Statutes expressly included the suits. Examples of such suits are a suit in equity analogous to an action for deceit [8] and a suit in equity to enforce a debt against the property held to the separate use of a married woman before the Married Women's Property Act.[9] There are other suits, as, for example, suits for specific performance or rescission of contracts, to which a rigid rule about the effect of delay is unsuitable, but for these it is useful to be able to adopt the statutory period of limitation when a certain and definite period is required [10]; so in these the Court applies the ordinary rules of laches and adopts by analogy the statutory period of limitation in suitable cases.

The Equitable Rule in Cases of Fraud.

The first important case on fraud is *Booth* v. *The Earl of Warrington*,[11] decided by the House of Lords in 1714. The facts were as follow: The Earl of Warrington, whose estates were heavily incumbered, used Booth, his uncle, to arrange a marriage between him, the Earl, and a rich heiress. Booth told the Earl that he, Booth, had spent over £1,050 to induce friends of the heiress to support the Earl's claims and the Earl therefore paid Booth £1,065 as principal and interest. Nine years later he discovered that Booth had never spent the money and he sued Booth in equity for the money.[12] Booth argued that the suit was in the nature of an action for money had and received and should be barred by the Statute of Limitations in equity as well as at law, but the House of Lords, assisted by the judges, held that in spite of the nine years the Earl could recover the money. Unfortunately the report gives only the questions which the House set to the judges and does not give the answers of the judges to the questions, or any judgments. There has therefore been much guesswork about the real ground of the decision.[13]

During the rest of the eighteenth and the first half of the

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[8] *E.g. Peek* v. *Gurney* (1873) L. R. 6 H. L. 377.

[9] *E.g. Re Hastings* (1886) 35 Ch. D. 94 (C. A.).

[10] This method of applying the Statutes of Limitation is admirably illustrated in *Thomson* v. *Eastwood* (1877) 2 App. Cas. 215, 241.

[11] 4 Bro. P. C. 163.

[12] The report does not relate what Mary, Countess of Warrington, thought of the proceedings.

[13] See in particular *per* Story J. in *Sherwood* v. *Sutton* (1828) 5 Mason 143, *per* Brett L.J. in *Gibbs* v. *Guild* (1882) 9 Q. B. D. 59, and *per* Palles C.B. in *Barber* v. *Houston* (1884) 14 L. R. Ir. 273.

nineteenth centuries there was a number of cases in Courts of Equity which confirmed and established the rule that in certain circumstances, where on account of fraud the plaintiff's cause of action remained undiscovered, the Statutes of Limitations would not run against the plaintiff until the cause of action was discovered.[14] It was not, however, until after the Judicature Act that the principles of rule were established.

In 1882, after the Judicature Act, *Gibbs* v. *Guild*,[15] the most important case upon the point, came before the Court of Appeal. In that suit the plaintiff, a shareholder in a company, was suing the defendant, who was the promoter and afterwards the auditor of the company, for damages on the ground that he had issued and delivered to the plaintiff a balance sheet and other instruments in which he had fraudulently misrepresented the financial position of the company with the result that the plaintiff had been induced to spend £2,500 in buying shares in the company which were worthless. The defendant answered that the plaintiff's cause of action did not accrue within six years. To this the plaintiff replied that he had not, and could not with reasonable diligence have discovered, the existence of the fraud before the commencement of the action and that the defendant had deliberately and actively concealed the fraud until within six years before the commencement of the action. The Court of Appeal held on a demurrer that this was a good reply to the plea of the Statute of Limitations.

The three judgments proceed on different lines. Holker L.J., who dissented from the majority judgment, gave the following reasons: Before the Judicature Act the Courts of Law and the Courts of Equity would have had concurrent jurisdiction over the suit; in cases within their concurrent jurisdiction the Courts of Equity were as much bound by the Statute as they would have been if it had expressly included them and in such suits they therefore held that the right of action accrued when the fraud was perpetrated, although in matters within their sole jurisdiction, when they acted merely by analogy to the Statute, they would not hold the right to have accrued until the fraud was discovered. *Booth* v. *Lord Warrington*, which might seem to be authority against Holker L.J.'s decision, he thought to be decided on some ground which did not appear in the report.

Brett L.J., in deciding for the plaintiff, followed Holker L.J. in thinking that the Courts of Equity where they acted in

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[14] See in particular *South-Sea Co.* v. *Wymondsell* (1732) 3 P. Wms. 143 and *Hovenden* v. *Annesley* (1806) 2 Sch. & Lef. 607.

[15] 9 Q. B. D. 59 (C. A.).

obedience to the Statute would interpret the Statute in precisely the same way as the Courts of Law, but differed from Holker L.J. in thinking that fraudulent concealment of the cause of action would give rise to a special equity that excluded the Statute. He said [16]:

'But assuming that the Statute of Limitations would be binding, the Courts of Equity, on doctrines of their own, sometimes applied, if other circumstances arose, a particular kind of equity. They did not construe the statutes so as to give an equity, they adopted an equity which was quite independent of the statute, but which no doubt had an effect on the transaction notwithstanding the statute, that is to say, they said if the existence of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground that the statute was a bar. It seems to me that there is some little confusion used in some cases as to the origin of the cause of action being a fraud. That is not the fraud which raised the equity; but if there was a cause of action, and if its existence was fraudulently concealed from the plaintiff by the defendant who had given that cause of action it was then that the plaintiff's equity arose notwithstanding that his cause of action had arisen more than six years before.'

Brett L.J. then considered the earlier decisions, and in particular *Booth* v. *The Earl of Warrington*, and held on the strength of that case that the Courts would apply their particular equity even when acting within their concurrent jurisdiction.

Lord Coleridge C.J., who also held for the plaintiff, decided upon somewhat different grounds. He said [17]:

'I apprehend that, to state it shortly, the principle laid down by him [Lord Redesdale] is this, the Statute of Limitations does really in a sense bind Courts of Equity as much as it binds the Courts of Law, for this reason, says Lord Redesdale, that equity follows the law; and that in general what are the legal rights will also be the equitable rights of suitors, and in ordinary cases the Statute of Limitations applies, not, he is careful to say, by analogy, but by reason of the obedience which the Courts of Equity owe to the Statute, but it has always been the principle of the Courts of Equity, while admitting the existence of legal rights, to take care that the particular suitors before them shall not be allowed to avail themselves of those legal rights in cases where it would be unjust. . . . They [the

[16] p. 68. [17] p. 64.

Courts of Equity] say that where the cause of action and the knowledge of action are contemporaneous, there the Statute runs in Courts of Equity as it runs at common law, but that where the existence of the cause of action is concealed from the person who ought to take advantage of it by the fraud of the person who creates it, such person shall not take advantage of the wrong which he himself has done, and that a fresh cause of action accrues from the moment that the fraud is discovered, and that to that fresh cause of action the Statute of Limitations will be applied by the Courts of Equity.'

Another lucid and ingenious judgment was delivered by Palles C.B. in the Irish case, *Barber* v. *Houston*.[18] There the plaintiff alleged that the defendant had fraudulently misrepresented to him that certain lands were capable of supporting more sheep than in fact they could support and that he had thereby been induced to take a lease of the lands and had suffered £9,300 damages, for which he sued. The defendant pleaded the Statute of Limitations. The plaintiff replied that the cause of action was fraud and that the plaintiff did not discover, and could not have discovered, that the representations were false until within six years before the commencement of the action; he did not allege, and could not in any real sense have established, that the defendant had fraudulently concealed the cause of action. Palles C.B., delivering the judgment of the Court, based his decision on the judgment of Brett L.J. in *Gibbs* v. *Gould* and held that as the action would before the Judicature Act have been within the concurrent jurisdiction of the Courts of Equity and as there was no concealment such as would raise a special equity, the plaintiff's action was barred by the Statute of Limitations.

The last important case on the principle of the equitable rule is the Privy Council decision *Bulli Mining Co.* v. *Osborne*.[19] The defendant in that case had extended his mine underground and had mined the plaintiffs' coal knowing it to be the plaintiffs'. He had taken no steps to conceal his misappropriation, but because it was underground the plaintiffs had not discovered it until shortly before the action. The defendant pleaded the Statute of Limitations and argued that the case was one in which the Courts of Equity acted in obedience to the Statute, that they

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[18] (1884) 14 L. R. Ir. 273, affirmed on appeal, 18 L. R. Ir. 475; the Court of Appeal found that there was no sufficient evidence of fraud, but said that if there had been fraud the suit would nevertheless have been barred, as Palles C.B. held.

[19] [1899] A. C. 351. The Courts of Equity had a special jurisdiction in cases of mines : see *Jesus College* v. *Bloom* (1745) 3 Atk. 262.

were therefore as much bound by the Statute as were the Courts of Law, that they would only prevent the defendant from pleading the Statute if fraudulent concealment was proved, that here there was no evidence of concealment, and that therefore the plaintiffs were barred. The Privy Council expressly rejected this argument, which is substantially the argument of Palles C.B. in *Barber* v. *Houston*, and took the view rather that the Statute was only in a limited sense binding upon the Courts of Equity and that in a case of undiscovered fraud, they would not be bound by it; the plaintiff could therefore recover notwithstanding the Statute.

Bulli Mining Co. v. *Osborne*[20] is often regarded as a decision on the amount of concealment necessary to raise Brett L.J.'s special equity, but I do not think that this is its true significance. There is in fact a difference of principle between the judgments of Holker L.J., Palles C.B. and probably Brett L.J. on the one hand and of Lord Coleridge and the Privy Council on the other, and this difference which unless explained is apt to be confusing, arises, I think, out of the different interpretations of Lord Redesdale's distinction between action in obedience to, and action by analogy to, the Statute. We have already seen that on one interpretation a Court of Equity acts in obedience to the Statute whenever it acts within its auxiliary or concurrent jurisdiction and that in so acting it is as much bound as if suits in equity had been expressly included within the Statute, but that on the second interpretation, which was submitted to be the correct interpretation, a Court of Equity only acts in obedience to the Statute in so far as equity follows the law and will not so act when it would be inequitable to do so. On the first interpretation, which is that of Holker L.J., Palles C.B. and probably Brett L.J., an exception can only be provided in cases of fraud by introducing some extraneous equity overriding the Statute and this equity is regarded as arising out of fraudulent concealment. On the second interpretation, which is that of Lord Coleridge and the Privy Council, the exception comes naturally whenever it would be inequitable to follow the law, as it would be either in a case of fraudulent concealment or in a case of a cause of action based upon fraud which had in fact remained undiscovered. I think, therefore, that the true significance of *Bulli Mining Co.* v. *Osborne* is that it decides in favour of the view that the equitable rule in cases of fraud is a natural consequence of the principles on which the Courts of Equity adopted the

[20] [1899] A. C. 351.

Statute of Limitations rather than an extraneous equity, and accordingly that concealment is not a necessary part of the defence to the Statute when the cause of action is based upon fraud which has remained undiscovered.[21]

The Courts of Law.

Until now we have been dealing with the Courts of Equity. It has sometimes been suggested that the Courts of Common Law would in a suitable case of fraudulent concealment have adopted the equitable rule, but the authority in favour of the suggestion is not strong. As we shall see, the point still arises after the Judicature Act and it is necessary to examine the authorities upon it.

In *Worthington* v. *Wilkinson*,[22] in 1729, Lord Chancellor King said that when there was plain fraud the plaintiff could take advantage of it at law to exclude the Statute of Limitations and accordingly granted the plaintiff discovery to enable him to prove fraud. In *Bree* v. *Holbech*[23] Lord Mansfield, a judge especially apt to introduce equity into law, said that there might be cases at law which fraud would take out of the Statute and gave the plaintiff leave to amend his pleadings so that the point might be argued, but the result of the argument is not reported. There is also an *obiter dictum* in *Brown* v. *Howard*[24] that where the action is grounded on fraud the limitation will run only from the discovery of the fraud, and there is an *obiter dictum* in *Clark* v. *Hougham*[25] that the Statute might not apply at law in a case of continuing fraud which lasted to within six years of the action. On the other hand, in *Imperial Gas Co.* v. *London Gas Co.*,[26] a Court of Law definitely held that an action for trespass for breaking the plaintiff company's gas mains was barred in six years in spite of an allegation of fraudulent concealment and a replication of fraudulent concealment was also held bad in *Hunter* v. *Gibbons*.[27]

These two last decisions would, one would think, be conclusive were it not for the fact that the Court of Appeal in *Gibbs* v. *Guild*,[28] while not overruling them, threw doubt upon them and plainly stated that the Court of Appeal would not consider itself

[21] Some further discussion of the authorities will be found in *Oelkers* v. *Ellis* [1914] 2 K. B. 139.
[22] Moseley 244.
[23] (1781) 2 Doug. 654.
[24] (1820) 2 Br. & B. 73.
[25] (1823) 2 B. & C. 149.
[26] (1854) 10 Ex. Rep. 39.
[27] (1856) 1 H. & N. 459.
[28] (1882) 9 Q. B. D. 59.

bound by them. In view of this criticism it is still doubtful whether before the Judicature Act the Courts of Common Law would have adopted the equitable rule. In *Armstrong* v. *Milburn* [29] a Divisional Court held that it and lower Courts were bound by *Hunter* v. *Gibbons* and *Imperial Gas Co.* v. *London Gas Co.*, and in *Osgood* v. *Sunderland* [30] Bailhache J. followed, though unwillingly, the decision of the Divisional Court.

Now *Armstrong* v. *Milburn* [31] went to the Court of Appeal, which took an entirely different view of the facts and reversed the judgment of the Divisional Court on that ground, but did not expressly throw doubt on the conclusion of law reached by the Divisional Court. McCardie J. in *Lynn* v. *Bamber* [32] came to the conclusion that, contrary to the opinion of Bailhache J., the decision of the Divisional Court was not binding upon him, because he considered that the Court of Appeal had impliedly disagreed with the Divisional Court. It is most respectfully submitted that there is very little in the judgment of the Court of Appeal to support this conclusion of McCardie J. and that for any Court below the Court of Appeal it should be held that the Courts of Law before the Judicature Act would not have adopted the equitable rule.

In the Court of Appeal the matter is still open and it would undoubtedly be a great improvement in the law if *Hunter* v. *Gibbons* and *Imperial Gas. Co.* v. *London Gas Co.* were overruled. It is, however, submitted that the authority against them is weak and on principle, if, as has been submitted, the rule in equity is due to the limited application of the Statutes of Limitations to Courts of Equity, it is hard to see why the Courts of Common Law should have adopted the rule.

The importance of the point at the present day arises from the fact that if there is an action which before the Judicature Act could only have been brought at common law the Court will still apply the common law rule. *Osgood* v. *Sunderland* [33] illustrates how the point arises. There the plaintiff sued the defendant for damages for breach of a contract to install electric light in the plaintiff's house. The defendant had not properly covered the wires as a protection against fire, but he had covered a few feet of each wire near the holes by which the system was inspected and thus the omission was concealed from a person inspecting and was not in fact discovered until more

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[29] (1886) 54 L. T. 247, 723.
[30] (1914) 111 L. T. 529.
[31] (1886) 54 L. T. 247, 723.
[32] [1930] 2 K. B. 72.
[33] (1914) 111 L. T. 529.

than six years later. Bailhache J. found on the facts that there was concealment, presumably fraudulent, but held that the case could only have arisen in a Court of Common Law before the Judicature Act and that in such a Court the fraudulent concealment would not have excluded the Statute.[34] *Armstrong* v. *Milburn*,[35] where again it was held that the common law rule applied, was a suit against a solicitor for negligence. In general, circumstances which would support an action in tort (except an action for deceit and some other particular torts) or an action for damages for breach of contract where the breach itself was not fraudulent would not, subject to what is said below, have supported a suit in equity before the Judicature Act and are *prima facie* still governed by the common law rule.

Apart, however, from the contention that a Court of Common Law would have applied the same rule as a Court of Equity, it is still possible to contend that even in such cases as *Osgood* v. *Sunderland* and *Armstrong* v. *Milburn*, the plaintiff could, before the Judicature Act, have obtained relief in Courts of Equity. This latter contention has never been fully argued, but it is perhaps in a suitable case the more likely of the two contentions to succeed. It was suggested in *Imperial Gas Co.* v. *London Gas Co.* that when a plaintiff had by acts of trespass committed within six years of the action concealed an earlier cause of action so that it became statute-barred, the defendant might bring an action of trespass at common law and might recover therein as consequential damages all the damages which he could have recovered by suing upon the earlier cause of action before it was barred. So in a case when the plaintiff had by a fraudulent misrepresentation concealed an earlier cause of action so that it became statute-barred it might be that the plaintiff could in an action for deceit founded upon the misrepresentation have recovered consequential damages for the loss of the right of action which had become statute-barred. Now a suit analogous to an action for deceit could in some cases have been brought in equity,[36] and it is possible that the plaintiff could before the Judicature Acts have recovered such consequential damages in a suit in equity grounded upon the misrepresentation. There is in fact some authority in favour of this proposition. In *Blair*

[34] It does not appear from the report that Bailhache J. expressly found that the concealment was fraudulent, but he decided the point of law on the basis of fraudulent concealment. It should be noted that the claim on the writ and the pleadings appears to have been a claim for breach of contract, and a different conclusion might have been reached if a claim for damages for deceit had been pleaded.

[35] (1886) 54 L. T. 247, 723.

[36] *Peek* v. *Gurney* (1873) L. R. 6 H. L. 377.

v. *Bromley*,[37] a suit against a solicitor whose partner had fraudulently converted to his own use a client's money, Wigram V.-C., discussing whether the Court of Equity had jurisdiction, said (p. 559):

'I have endeavoured to inform myself whether there was any form of action by which the Plaintiffs' proceedings at law might have avoided the Statute of Limitations; and I believe I am correct when I say there is no proceeding at law by which they could have avoided the effect of the statute: no proceeding founded solely on any distinction arising out of the fraud. The consequence is that the Plaintiffs have lost their remedy at law; and they are remediless unless relief be given in this Court. The jurisdiction of this Court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud.'

This observation at least suggests that the Courts of Equity would have entertained any suit in which there was fraudulent concealment if it was so presented that fraud was the gist of the suit. If so, any Court at the present day should apply the equitable rule to such a suit provided that the action was so pleaded as to make deceit one of the causes of action. It should be noted in this connexion that *Lynn* v. *Bamber* by suitable pleading could, if fraud had been proved, have been based upon deceit and not breach of warranty, and that in *Osgood* v. *Sunderland* an attempt was made to base the suit upon deceit, but was rejected on the ground that the only claim on the pleadings and writ was for breach of contract.

There are, however, certain difficulties in supposing that the Courts of Equity would have taken on themselves purely common law actions, involving maybe the assessment of damages and other questions suitable for a jury, and it may be that they would have preferred to restrain the defendant from pleading the Statute in the action at law. There is no suit reported in which a Court of Equity has been asked so to restrain the defendant on account of his fraud, but there are several cases in which a defendant has been so restrained because the plaintiff has been prevented from bringing his action by an injunction.[38] The judgment of Lord Redesdale in one of these cases, *Bond* v.

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[37] (1846) 5 Hare 542; 2 Ph. 354; the judgment on appeal was based upon rather different grounds.

[38] *Bond* v. *Hopkins* (1802) 1 Sch. & Lef. 413; *Blennerhassett* v. *Day* (1811) 2 Ball & B. 104. *Hunter* v. *Gibbons*, where the plaintiff tried to avoid the Statute in a Court of Common Law by an equitable replication under the Common Law Procedure Act, is an authority against the present contention; but see the observations of Brett L.J. upon this point in *Gibbs* v. *Guild*.

Hopkins, suggests that a defendant might have been restrained on account of fraud. Lord Redesdale said [39]:

'One acknowledged principle on which Courts of Equity give relief, is to prevent an advantage gained at Law from being used against conscience. . . . So, a party may have a title at Law if temporary bars were out of the way. . . . And in the present case, it is not disputed that temporary bars ought to be put out of the way: but it is said that the bar arising from lapse of time ought not to be removed; why not as well as a satisfied term, if used against conscience?'

It may, I think, fairly be said in conclusion that there is authority in favour of the proposition that in any case of fraudulent concealment in which the Common Law Courts were bound by the Statute the Courts of Equity would have granted relief, and that the Court of Appeal at the present day could on this ground extend the equitable rule to all actions without unduly straining the law.

The conclusions which we have reached may be summarized as follows:—

1. The equitable reply to the Statutes of Limitations in cases of fraud arises from the fact that the Statutes were only in a limited sense binding upon the Courts of Equity.

2. Concealment is not a necessary part of the equitable reply. It is enough that the fraud has not in fact been discovered earlier than the statutory period preceding the action.

3. The balance of authority is against the view that the Courts of Common Law before the Judicature Act would have followed the equitable rule and, whatever the Court of Appeal may decide, this point should be considered as settled for inferior Courts.

4. It is at least possible that any case in which there is fraud would before the Judicature Acts have been entertained in a Court of Equity; if so, subject to proper pleading, the common law rule should never be applied at the present day.

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[39] Pages 430, 431.

NUISANCE AS A TORT.

P. H. Winfield.

THE aim of this article is to consider the relations of nuisance as a tort to three other branches of the law of tort:

(1) The rule in *Rylands* v. *Fletcher*.

(2) Negligence.

(3) Trespass to land.

It would clear the ground if we could start with a definition of nuisance, but it has been truly said that it is not a term capable of exact definition,[1] and, considering its historical origin, we should be astonished if it were. Derivatively, it is the Latin *nocumentum*, the French *nuisance*,[2] and it acquired a specific legal meaning very early in our legal history. Bracton had a good deal to say about *nocumenta*. Some of these he described as *damnosa*, but not *iniuriosa*, and men must bear them as best they may. But where *nocumenta* are *iniuriosa* as well as *damnosa*, they are all injuries to 'servitudes,' and are the subject of legal complaint.[3] Here we might hastily conclude that Bracton gives us the touchstone of nuisances, and that they were merely infringements of easements and *profits à prendre*. Unfortunately the ground is less solid than it appears to be, for he had looser ideas about the meaning of a 'servitude' than we have. He includes under it not only easements and *profits à prendre*, but also what would now be styled 'common rights,' or 'natural rights,' *i.e.* the freedom of a man to do what he likes on his own land. Bracton regarded this freedom as conferring on the tenant a 'servitude' to redress 'nuisance,' or harm done by his neighbour to his enjoyment of his land.[4] Hence originated a confusion of servitudes *stricto sensu* with common rights, which, as Sir William Holdsworth has pointed out,[5] is traceable in the Year Books and indeed throughout our legal history until the nineteenth century. The confusion cleared away only

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1 21 'Laws of England' (Halsbury), § 843; Garrett, 'Nuisances' (3rd ed. 1908), 4; Pearce & Meston, 'Nuisances' (1926), 1.

2 Pollock & Maitland, ii, 534, n. 2.

3 Fol. 231b—235b.

4 *Ibid.* 220b—221.

5 'History of English Law,' vii, 328—333.

gradually, for the distinction was grasped, but not firmly, in 1625[6], and two more centuries elapsed before it was clearly perceived.[7] This is by no means a complaint that nuisance ought to have been confined, or ought now to be confined, exclusively to injuries to servitudes *stricto sensu* or exclusively to infractions of common rights, but it must be confessed that Bracton's breadth of terminology made the separation of these two ideas a tough affair for the judges of a later day, and if common rights be such as a man can exercise on his own land for the enjoyment of it, it is obviously difficult to say what is comprised in such a vague phrase. That appears in early attempts to define nuisance quite as much as in modern ones.[8] The best that Blackstone could do with it was 'any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another,'[9] but even then he had more to say in another chapter entitled 'Of Disturbance' about matters, some of which are now regarded as nuisances.[10] At the present day, we shall perhaps be as near to definition as it is possible to get, if we describe a private nuisance as *an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with, it.*[11] And it includes injuries to servitudes as well as to other rights connected with property.[12]

A few words must be said of the Common Law remedies for nuisance before we pass to the main theme of this article. They were four in number:

(i) The assize of nuisance.

This was really supplementary to the famous assize of novel disseisin, which was limited to redressing any act of the defendant that interfered with the plaintiff's seisin of land. Variants of the assize were well known in the twelfth century,[13] and in the thirteenth we hear of the assize of nuisance as filling a gap for which novel disseisin was useless. If the *nocumentum* to the plaintiff began wholly on the defendant's land (*e.g.* if he erected there a dam which diverted water from the plaintiff's land) the assize of novel disseisin was inapplicable, because the injury was not a disseisin, as there was no entry on the plaintiff's land.

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[6] *Sury* v. *Pigot*, Popham 166.

[7] *Elliotson* v. *Feetham* (1835) 2 Bing. (N.C.) 134; *Bliss* v. *Hall* (1838) 4 Bing. (N.C.) 183; *St. Helens Smelting Co.* v. *Tipping* (1865) 11 H. L. C. 642.

[8] *E.g.* Finch, 'Law' (1629), 187—188.

[9] 'Comm.' iii, 216.

[10] *Ibid.* iii, ch. xvi.

[11] For other definitions, see Pollock, 'Torts' (13th ed. 1929), 417; Salmond, 'Torts' (7th ed. 1928), 257, 372; Clerk & Lindsell, 'Torts' (8th ed. 1929), 344.

[12] Sir John Salmond's objection to this inclusion was unhistorical, and is not maintained by his learned editor: 'Torts,' 372.

[13] Glanvill, xiii, cc. 35—37.

But the plaintiff could sue the assize of nuisance, and it extended both to injuries to servitudes and injuries to common rights.[14] Now it is pretty obvious that the same act of the defendant might leave the plaintiff in a puzzle as to which assize he ought to sue, *e.g.* raising a pond where part of the water affected belonged to him and part to the defendant. Strictly, he was bound to sue both assizes, but, in order to avoid multiplicity of actions, he was allowed to sue nuisance only, for success in it would put an end to the source of the evil (because the defendant must abate it) whatever the ultimate effects of the wrongful act might be.

(ii) The action *quod permittat prosternere.*

If the land on which the nuisance was created was alienated, the plaintiff could sue this action, the writ in which commanded the defendant to allow the plaintiff to abate the nuisance.[15] It was in the nature of a writ of right and was therefore open to the infinite delays appropriate to that form of procedure. When exactly it was introduced is a historical problem on which we can cast no more than a passing glance. One would like to accept Coke's neat theory that it was in existence before the Statute of Westminster II, 1285, c. 24, and that the reason why the Statute extended the assize of nuisance to cases where the land had been transferred to someone else was to give the aggrieved party a remedy less clumsy than the writ *quod permittat prosternere.*[16] But the weak spot in his theory is that nothing like the writ *quod permittat prosternere* of which Fitzherbert gave a specimen about 250 years after the Statute of Westminster II has been unearthed before that Statute.[17] The point is of purely antiquarian interest, for the writ *quod permittat prosternere* and the assize of nuisance were both abolished after a long period of obsolescence by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27, s. 36).

(iii) The writ of trespass.

It is hard to ascertain how far, if at all, this was a remedy for nuisance. More will be said of this later.

(iv) Action upon the case for nuisance.

This became the sole Common Law action. Its advantages over the assize of nuisance and the *quod permittat prosternere* were, first, its simpler process, and, secondly, the absence of any

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[14] Bracton, cc. 44, 45; ff. 232 *seq.* His earlier statements are not very clear, but c. 45 seems to justify the epitome given above.

[15] F.N.B. 124 H.

[16] 2 Inst. 405; accepted by Blackstone, 'Comm.' iii, 221—222.

[17] F.N.B. 124 H. No such writ is traceable in the printed Reg. Brev., or in the lists of writs given in Holdsworth, 'History of English Law,' ii, App. V, 606, or in Bracton's 'Note Book,' or in Pollock & Maitland.

requirement that the parties should be freeholders. Its disadvantage was that it lay only for damages, not for abatement, as did the older remedies, and unless the successful plaintiff resorted to Equity, he might have to raise the *posse comitatus* to get rid of a nuisance which an obstinate and ill-natured neighbour refused to remove.[18] The action was apparently known as early as Henry IV's reign.[19]

The older Year Books do not report as much litigation about nuisances as one would expect, but borough courts could deal more promptly and cheaply than the King's courts with a species of wrong which must always be commoner where buildings are aggregated than in the open country.[20]

We can now pass to the connexion between:

(1) *Nuisance and the rule in* Rylands *v.* Fletcher.

The rule in *Rylands* v. *Fletcher* is embodied in the oft-cited paragraph of the judgment of the Court of Exchequer Chamber delivered by Blackburn J.:

'The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.'[21]

A problem which was certainly not solved by the Court itself is, 'What new rule of law, if any, was set up by *Rylands* v. *Fletcher*?' In the judgment itself it would appear that the Court was making a pontifical statement of existing principle rather than laying down a new rule, for they regarded their own proposition as having been anticipated by Holt C.J. more than two and a half centuries earlier,[22] and they cited as examples of it liability for (a) cattle trespass, (b) escape of mischievous animals, (c) nuisance by the escape of fumes.

In fact, Holt C.J.'s decision[23] related to the escape of filth,

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[18] Blackstone, 'Comm.' iii, 222.

[19] It is referred to in Y. B. Mich. 2 Hen. IV, f. 11, pl. 48, Br. Abr. Act. sur le Cas, 29, and Y. B. Mich. 11 Hen. IV, f. 25, pl. 48. Cf. Holdsworth, *op. cit.* iii, 27—28.

[20] In London, in the thirteenth century, an assize of twelve aldermen, with the mayor, could settle within a week disputes about fences between lands and blocking up the entrance to a shop or house. In Ipswich, pleas of nuisance were, in certain circumstances, free from the troublesome delay of essoins. 'Borough Customs,' 18 S. S. vol. i, 245—249, 254. See too 'Leet Jurisdiction in Norwich,' 5 S. S. 56.

[21] (1866) L. R. 1 Ex. 265, 279; affirmed by H. L. (1868) L. R. 3 H. L. 330.

[22] L. R. 1 Ex. at pp. 282—284.

[23] *Tenant* v. *Goldwin* (1703) 2 Ld. Raym. 1089.

and his statement of principle was limited to that and to the escape of cattle, and was not nearly so sweeping as the rule expressed in *Rylands* v. *Fletcher*. The action was an innominate one upon the case, alleging negligent repair owing to which filth escaped from the premises of the defendant to those of the plaintiff. But whatever may have been the views of the Exchequer Chamber as to its own decision, the rule in *Rylands* v. *Fletcher* has been taken as the starting-point of a wider liability than any preceding it. It would be wrong to dismiss it as a convenient summary of the principle underlying several specific torts which had existed long before 1866, or even as the old cattle-trespass rule raised to a higher power.[24] The substantial advances which it made on the previous law were two: (a) in the direction of *things* for the escape of which an occupier of land is subjected to a strict liability; (b) in the direction of the *persons* for whose defaults in connexion with the escape of those things the occupier of land is vicariously responsible.

As to (a), the Court took a rule of liability which had been more or less clearly perceived in connexion with the escape of some special things like fire, cattle, or unruly beasts, and extended it to the escape of mischievous things generally. As to (b), it laid down that the occupier from whose land these things escaped is liable not only for the default of his servant, *but also for that of an independent contractor and* (as later decisions showed) *for that of any one except a stranger.*

It would appear that this sweeping extension of vicarious responsibility in (b) is the true meaning of the common statement that the occupier must keep the thing in 'at his peril.' The rule has been inaccurately described as creating 'absolute liability,' a statement which is nonsensical in view of the liberal exceptions to which the rule is subject.[25] 'Strict liability' seems to be the best epithet for a type of responsibility which makes a man answerable not only for the misconduct of his servants in the

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[24] *Contra* Salmond, 'Torts,' § 88 (4). But it is difficult to agree with the statement as to the four historical grounds of the rule in *Rylands* v. *Fletcher*. In three of them (liability for trespass, fire, and nuisance), it is too strong to say that absence of fault on the defendant's part was no defence. As to trespass and fire, see 42 L. Q. R. (1926), 44—51; as to nuisance, see Viner, Abr. Nusance (H), vol. xvi, 27 *seq.*, where several cases are cited which show that defendant was not liable, because, in effect, he was 'without fault'; see, too, Rolle Abr. Nusans, B 2, p. 137.

[25] 42 L. Q. R. (1926), 37—51. See too Scrutton L.J. in *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 140 L. T. 1. With equal inaccuracy liability for nuisance has been described as 'absolute': Pearce & Meston, 'Nuisances,' 24. To give no other example to the contrary, it is enough to cite *Barker* v. *Herbert* [1911] 2 K. B. 633, where it was held that a defendant is not liable for nuisance if he neither knew, nor could reasonably have known, that the nuisance had been created by a trespasser.

course of their employment, but also for that of an independent contractor, or of any one except a stranger.

Enough has been said to show that the rule in *Rylands* v. *Fletcher* started its career entangled with at least three other branches of the law—trespass of a highly special kind, escape of mischievous animals, and nuisance.[26] It is only with nuisance that we are here concerned, and its implication with *Rylands* v. *Fletcher* has steadily grown since the decision in that case.

To begin with, let us select what description of nuisance we may, we shall find that it will always cover the type of evil contemplated in *Rylands* v. *Fletcher*. Hence, the Courts have repeatedly treated the rule in that case as if it were a mere species of the wrong comprised in nuisance. Actions for nuisance have been brought for damage arising from the escape of electricity,[27] of sewage,[28] of water from a burst main,[29] of an explosion from an electric spark,[30] of rocks from the side of a hill,[31] of a skidding omnibus,[32] and most of them were considered throughout by the judges who tried them as if they were direct applications of the rule in *Rylands* v. *Fletcher*. And other actions of nuisance have been regarded as on the same footing for the purpose of applying some exception to the rule.[33] So, too, the text-books on nuisance have classified the rule in *Rylands* v. *Fletcher* as a variety of it.[34] Of course, on this hypothesis it is possible to ignore the genus 'nuisance,' and to rely exclusively on the species 'rule in *Rylands* v. *Fletcher*,' and that is exactly what has been done in another case on the escape of electricity.[35] Conversely, it is possible to ignore the species and to rely on the genus, and that was exemplified in a decision as to the escape of vibration, which proceeded solely on the ground of nuisance.[36] In at least one case it is impossible to discover whether the

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[26] And it is quite possible for the same set of facts to ground liability under *Rylands* v. *Fletcher* and liability for the tort of negligence: *Att.-Gen.* v. *Cory Bros. Ltd.* [1921] 1 A. C. 521.

[27] *National Telephone Co.* v. *Baker* [1893] 2 Ch. 186.

[28] *Jones* v. *Llanrwst U. D. C.* [1911] 1 Ch. 393; Parker J. regarded it as 'trespass' within *Rylands* v. *Fletcher*: *ibid.* 402—403.

[29] *Charing Cross etc. Co.* v. *London Hydraulic Power Co.* [1913] 3 K. B. 442.

[30] *Goodbody* v. *Poplar Borough Council* (1915) 84 L. J. K. B. 1230.

[31] *Pontardawe R. D. C.* v. *Moore-Gwyn* [1929] 1 Ch. 656.

[32] Fletcher Moulton L.J. in *Wing* v. *L. G. O. Co.* [1909] 2 K. B. 652, at pp. 665—668.

[33] Scrutton L.J. in *Job Edwards, Ltd.* v. *Birmingham Navigations* [1924] 1 K. B. 341, 356—357.

[34] Garrett, 'Nuisances' (3rd ed. 1908), 138 *seq.*; Pearce & Meston, 'Nuisances' (1926), 19—20 (a species of nuisance concerned with 'noxious or dangerous' things).

[35] *Eastern and South African Telegraph Co. Ltd.* v. *Cape Town Tramways Co. Ltd.* [1902] A. C. 381. So too with the escape of creosote: *West* v. *Bristol Tramways Co.* [1908] 2 K. B. 14.

[36] *Knight* v. *Isle of Wight etc. Co.* (1904) 73 L. J. Ch. 299

decision was based on *Rylands* v. *Fletcher* or on nuisance, but there is nothing surprising in this in view of the convenient formlessness of actions since the Judicature Acts.[37]

It would be incorrect, however, to state baldly that the rule in *Rylands* v. *Fletcher* is merely a species of nuisance. It is much nearer the truth to say that an accident of definition, or lack of definition, of nuisance may bring the same set of facts within either kind of liability, but that they differ notably in details, and that it is only where none of these differences of detail is in question that it is immaterial whether the action is for nuisance or is on the rule in *Rylands* v. *Fletcher*. Nuisance and that rule are related to one another as intersecting circles, not as the segment of a circle to the circle itself. Nor do the decided cases warrant any other view. If John Smith's artificial reservoir bursts and floods William Brown's land, it does not matter whether Brown sues Smith for nuisance or for breach of the rule in *Rylands* v. *Fletcher*. Smith is liable either way. But it does matter a great deal if the reservoir were erected by an independent contractor, or if a violent storm burst the reservoir, or if John Smith were not in occupation of his land, but had let it to Green; for in all these points the law of nuisance is not the same as the rule in *Rylands* v. *Fletcher*.

The differences between the two may now be summarized:

(i) Many nuisances are quite outside the rule in *Rylands* v. *Fletcher*, *e.g.* ordinary obstruction of a highway,[38] defective fencing,[39] watching and besetting workmen,[40] and many forms of interference with servitudes. Again, noise always seems to have been treated as nuisance pure and simple.[41]

(ii) Nuisance is confined to injuries which primarily affect the use or enjoyment of land. The rule in *Rylands* v. *Fletcher* is not limited in this way. Thus it applies to injuries sustained by a non-occupier of land owing to the escape of the defendant's fierce animal, and to harm done to the electric cables of the plaintiff, who had no interest in the land where the cables were laid, by the escape of water from the defendant's mains.[42]

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[37] *Ballard* v. *Tomlinson* (1884) 26 Ch. D. 194; (1885) 29 Ch. D. 115 ('action to restrain the defendants from polluting the water coming to a well belonging to the plaintiff').

[38] *Campbell* v. *Paddington Borough Council* [1911] 1 K. B. 869; *Att.-Gen.* v. *Brighton etc. Association* [1900] 1 Ch. 276.

[39] *Harrold* v. *Watney* [1898] 2 Q. B. 320; *Barker* v. *Herbert* [1911] 2 K. B. 633.

[40] *Lyons* v. *Wilkins* [1899] 1 Ch. 255.

[41] Whatever be the reason for this, it is not because *Rylands* v. *Fletcher* refers only to the escape of *tangible* matter, for it applies to vibrations, which can scarcely be described as tangible.

[42] *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* [1914] 3 K. B. 772. See too Pollock, 'Torts,' 507, and editorial note in Salmond, 'Torts,' 374.

(iii) There must be an 'escape' of the noxious thing before liability under *Rylands* v. *Fletcher* arises, whereas in nuisance a *quia timet* injunction is possible before any harm has occurred.

(iv) Nuisance may be legalized by prescription. This is inapplicable to the rule in *Rylands* v. *Fletcher*.

(v) The act of God is a defence peculiar to *Rylands* v. *Fletcher*. Inevitable accident constitutes a similar (but not identical) defence to nuisance.[43]

(vi) In nuisance, a non-occupier of the land on which the injury originates may be liable; *e.g.* the builder of a wall on land occupied by X has been held liable for thereby obstructing access to Y's private market[44]; and exceptionally a landlord may be liable for a nuisance on premises in the occupation of a tenant.[45] On the other hand, occupation of land by the defendant is essential to his liability in *Rylands* v. *Fletcher*.[46]

(vii) The defendant in *Rylands* v. *Fletcher* is liable for the wrongs of an independent contractor, but in nuisance this is not so, except in those circumstances in which the defendant is liable for such wrongs in any tort, *e.g.* if he expressly authorizes the independent contractor to commit them.[47] Moreover, one or two qualifications must be added with respect to nuisance. If the Legislature lays a duty on X to do an act without causing a nuisance, X cannot avoid liability by delegating that act to an independent contractor who misperforms it.[48] Again, X will be liable where the principle of *Bower* v. *Peate*[49] (which is not limited to nuisance) applies:

'A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary

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[43] Sir Frederick Pollock in 143 R. R. Pref. v—vi; Salmond, 'Torts,' § 93 (2) and note.

[44] *Thompson* v. *Gibson* (1841) 7 M. & W. 456.

[45] Salmond, 'Torts,' § 64.

[46] *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co. Ltd.* [1921] 2 A. C. 465; *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 140 L. T. 1, 5—6, 9; cf. Mr. W. T. S. Stallybrass's article on this case in 45 L. Q. R. (1929), 118.

[47] *Ellis* v. *Sheffield Gas Consumers' Co.* (1853) 2 E. & B. 767; *Howland* v. *Dover Harbour Board* (1898) 14 T. L. R. 355. Many of the decisions cited in the text-books on nuisance in this connexion are really on pure negligence; *e.g.* Pearce & Meston, 319 *seq.*; Garrett, 245 *seq.* Putting aside these, there is still a residuum of negligence cases in which the facts might equally well have been treated as constituting nuisance and apparently were so treated, and that is another source of embarrassment.

[48] *Hole* v. *Sittingbourne Ry. Co.* (1861) 6 H. & N. 488; *Gray* v. *Pullen* (1864) 5 B. & S. 970. So too where a statutory duty is assumed: *Robinson* v. *Beaconsfield R. D. C.* [1911] 1 Ch. 188.

[49] (1876) 1 Q. B. D. 321

to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.' [50]

But these are exceptions to the general rule, which is that the employer is not liable; he certainly is not where the contractor unnecessarily commits the nuisance.[51]

(viii) It has been held that unusual sensitiveness of the plaintiff's property to injury is no defence to an action of the *Rylands* v. *Fletcher* type, though it would be in an action for nuisance.[52]

(ix) It has also been held that in *Rylands* v. *Fletcher* liability is based on unnatural use of his land by the defendant, and on the object being dangerous in itself.[53] Exactly what is signified by 'unnatural user' and 'dangerous in itself' has been much debated, and was discussed with great ability by Mr. W. T. S. Stallybrass in this JOURNAL two years ago.[54] At any rate, it is doubtful in what sense, if any, the first of these restrictions applies to nuisance; and it is clear that the second does not, for the defendant in nuisance may quite well be liable even if what has done the injury is not dangerous in itself.

(2) *Nuisance and negligence.*

It is as well to preface this section with a reminder that negligence has two meanings in the law of tort:

(i) An independent tort, which consists in the breach of a duty to take reasonable care, the breach resulting in undesired damage to another person.

(ii) Advertence, or total or partial inadvertence to an act or omission and/or its undesired consequences. In this sense it is merely one mode of committing some (but by no means all) torts.

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[50] Cockburn C.J. *ibid.* at p. 327. He gave no test for distinguishing 'expected' from 'unexpected' 'injurious consequences,' but at any rate he regarded *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314 as an illustration of the principle. Cf. Clerk & Lindsell, 'Torts' (8th ed. 1929), 91, and *Hill* v. *Tottenham U. D. C.* (1898) 79 L. T. 495, and *Pickard* v. *Smith* (1861) 10 C. B. (N.S.) 470, for the difficulty of applying the rule.

[51] *Peachey* v. *Rowland* (1853) 13 C. B. 182. (The headnote treats the case as one of nuisance.) Scrutton L.J. in *Job Edwards, Ltd.* v. *Birmingham Navigations* [1924] 1 K. B. 341, 355, said *obiter* that the occupier is liable for nuisance if an independent contractor acted for his benefit in creating the nuisance, though contrary to the terms of his employment. He cited *Black* v. *Christchurch Finance Co.* [1894] A. C. 48. But there the liability seems to have been of the *Rylands* v. *Fletcher* type.

[52] *Hoare & Co.* v. *McAlpine* [1923] 1 Ch. 167. See Pollock, 'Torts,' 505, n. (*g*), and 39 L. Q. R. (1923) 145—146, for criticisms of this decision.

[53] *Noble* v. *Harrison* [1926] 2 K. B. 332.

[54] 3 Cambridge Law Journal (1929), 376—397.

We are concerned here mainly with (i) and only incidentally with (ii).

As to (i) we have shown elsewhere, in depicting the history of negligence, that negligence did not become an independent tort until early in the nineteenth century, that its source as such was the action upon the case for negligence, and that the elasticity of this led to inevitable overlapping of negligence with other nominate forms of tort.[55] One such instance of overlapping was with nuisance, and we take leave to repeat what was said in that article[56]:

'As to nuisance and negligence, it might be said until quite recently that there was a hybrid action of nuisance and negligence. Sometimes it looks as if negligence were the substance of the action, and nuisance were an untechnical term[57]; sometimes the exact reverse would be the truth,[58] and then, again, "negligent" has figured as a persistent term in the declaration which the Court persistently ignored in deciding on grounds of nuisance.[59] Finally, there are judgments which must have gone on one ground or the other, but on which must remain a secret.'[60]

It was further pointed out that nowadays there is a strong judicial tendency to exorcise the ghost of action upon the case for negligence from the action of nuisance.[61] But it is perfectly compatible with this separation of the two torts that the same set of facts may, at the present day, support an action for either negligence or nuisance.[62] They are, however, distinguishable in the following respects:—

(i) In negligence, the plaintiff must prove that the defendant was under a duty to take care; in nuisance, this is unnecessary. All that the plaintiff need show is that he has been injured by the defendant's conduct. He starts with the presumptive rule in his favour that every man is bound to use his own property in such a manner as not to injure the property of his neighbour.

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55 42 L. Q. R. (1926), 148—201.

56 *Ibid.* 197—198.

57 *Coupland* v. *Hardingham* (1813) 3 Camp. 398.

58 *Wilkins* v. *Day* (1883) 12 Q. B. D. 110.

59 *Gandy* v. *Jubber* (1864) 5 B. & S. 78; *Borough of Bathurst* v. *Macpherson* (1879) 4 App. Cas. 256.

60 *E.g.* Blackburn J. in *Tarry* v. *Ashton* (1876) 1 Q. B. D. 314.

61 '"Nuisance" and "negligence" are different in their nature and consequences': Fletcher Moulton L.J. in *Wing* v. *L. G. O. Co.* [1909] 2 K. B. 652, 665. 'The differences between cases of nuisance and cases of negligence must never be lost sight of': Hamilton L.J. in *Latham* v. *Johnson* [1913] 1 K. B. 398, 413. See too Pickford L.J. in *Wheeler* v. *Morris* (1915) 84 L. J. K. B. 1435, 1438.

62 *Isaac Walton & Co.* v. *Vanguard Motorbus Co. Ltd.* (1908) 25 T. L. R. 13 (skidding motor omnibus); cf. *Wing* v. *L. G. O. Co.* [1909] 2 K. B. 652.

The burden is on the defendant to establish some appropriate defence.

(ii) In negligence, assuming that the duty to take care has been proved, the vital question is, 'Did the defendant take reasonable care?' But in nuisance it does not in the least follow that the defendant is quit of liability even if he has taken reasonable care. It is true, indeed, that 'reasonable' is a word constantly used in litigation connected with nuisance, and that the result of a long chain of cases is that unreasonableness is a main ingredient of liability in nuisance. But here 'reasonable' means something more than merely 'taking proper care.' It signifies what is legally right as between the parties taking into account all the circumstances of the case, and some of these circumstances are often such as a man on the Clapham omnibus could not fully appreciate. It is putting a comparatively simple proposition before him to tell him that he is liable for negligence if he carelessly drives his car against another person; but it is not so simple to tell him that, while he can make some noise on his premises, he must not make too much, or he will be liable for nuisance. Knocking a man down carelessly is a tort *simpliciter*; making a noise is a tort only *sub modo*. Thus it must often be a pure gamble whether I act lawfully in opening a particular business in a street. If I make an error of judgment in deciding whether the business is offensive or not, I shall not escape liability by proving that I took all reasonable care to prevent the business from being a nuisance.[63] This is far short of saying that taking care is irrelevant in liability for nuisance. If the defendant has conducted his trade or business in a proper manner, *i.e.* as a reasonable man would conduct such a trade or business, he has gone some of the way towards making out a defence, but only some of the way[64]; and, conversely, he will be in danger of losing his case if he has taken no such reasonable care.[65] But even where he has given proof of it, he will still be liable if there has been a sensible (*i.e.* unreasonable) amount of damage caused to the plaintiff. So he will be if he has taken over from another person property on which existed a nuisance,[66] though he will not be liable for the act of a trespasser in creating the nuisance unless he could reasonably have known of it, and here again

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63 Lindley L.J. in *Rapier* v. *London Tramways Co.* [1893] 2 Ch. 588, 600.
64 *Stockport W. W. Co.* v. *Potter* (1861) 7 H. & N. 160.
65 *May* v. *Stoop* (1909) 25 T. L. R. 262; *Manchester Corporation* v. *Farnworth* [1930] A. C. 171.
66 *Broder* v. *Saillard* (1876) 2 Ch. D. 692.

'reasonable care' is a relevant matter.[67] 'Reasonableness' thus plays an important part in deciding whether there has or has not been a nuisance. But it will not do to leave to the jury the bare question, 'On the facts, has the defendant acted like a reasonable man?'[68] Much more in the way of detail is needed than that, as appears in the judgment of the Exchequer Chamber in *Bamford* v. *Turnley*,[69] and in the direction of Mellor J. in *St. Helens Smelting Co.* v. *Tipping*, which is the *locus classicus* on the point.[70]

(iii) Contributory negligence is a defence appropriate to negligence, but not to nuisance; for negligence as a tort consists in lack of due care and, as that is never the primary question in nuisance, it is inaccurate to speak of the antithesis 'contributory' negligence in connexion with it. This of course does not mean that a plaintiff in nuisance can do any foolhardy thing he thinks fit and still hope to win his case. It is a fixed rule in nuisance that it is no defence to plead that the plaintiff 'came to the nuisance'; but it is equally a fixed rule that account must be taken of the district where the alleged nuisance occurred, and that if a man sees fit to build a dwelling-house in the heart of a great manufacturing district, he must put up with a good deal more discomfort than if he resided in the country. But he would lose an action for nuisance, not because there is any contributory negligence on his part, but simply because reasonableness generally (and not reasonable care in particular) is a factor in determining whether a nuisance exists; and he has

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[67] *Barker* v. *Herbert* [1911] 2 K. B. 633, especially Vaughan Williams J. at pp. 636—637. *Barker* v. *Herbert* was followed by Scrutton L.J. in *St. Anne's Well Brewery Co.* v. *Roberts* (1929) 140 L. T. 1, 7. See too *Ilford U. D. C.* v. *Beal* [1925] 1 K. B. 671, *Smith* v. *G. W. Ry. Co.* (1926) 135 L. T. 112. *Humphries* v. *Cousins* (1877) 2 C. P. D. 239 is not inconsistent, for it was really an application of *Rylands* v. *Fletcher; Ilford U. D. C.* v. *Beal* [1925] 1 K. B. at pp. 677—678. Cf. Scrutton L.J. in *Job Edwards, Ltd.* v. *Birmingham Navigations* [1924] 1 K. B. 341, 356; that decision illustrates the difficulty of deciding whether the defendant has been negligent or not.

[68] This was what the judge went near doing in *Hole* v. *Barlow* (1858) 4 C. B. (N.S.) 334, and perhaps that is why *Bamford* v. *Turnley* (next note) has been regarded as overruling it. But it is hard to discover exactly what the judges in later cases objected to in *Hole* v. *Barlow*, or why they regarded *Bamford* v. *Turnley* as overruling it, or how much of *Hole* v. *Barlow* is overruled.

[69] (1862) 31 L. J. Q. B. 286.

[70] 'Every man is bound to use his own property in such a manner as not to injure the property of his neighbour, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so. But the law does not regard trifling inconveniences; every thing must be looked at from a reasonable point of view: and therefore in an action for nuisance to property by noxious vapours arising on the land of another, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining that question the time, locality, and all the circumstances should be taken into consideration': (1863) 4 B. & S. 608, 616; 11 H. L. C. 642.

behaved unreasonably in the circumstances.[71] So, too, with the plaintiff's acquiescence in the alleged nuisance. 'If one man stands by and encourages, though but passively, another to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with it by him who formally permitted and encouraged those acts, of which he either now complains or seeks to obtain the advantage.'[72]

(iv) Many instances of nuisance and of negligence, respectively, have nothing whatever in common. Careless surgery may be negligence; it is not nuisance. Obstructing ancient lights may be a nuisance; it is not negligence.

(3) *Nuisance and trespass to land.*

The leading text-books on the law of tort are in direct conflict as to the possibility of a coincidence of nuisance with trespass. Sir Frederick Pollock considers that the two may coincide, some kinds of nuisance being also continuing trespass.[73] Sir John Salmond was of opinion that they are mutually exclusive.[74]

We must see what historical assistance is available for choosing between these views. A few cases in the Year Books are occupied with the question whether assize of nuisance or trespass was the correct action on the facts, but we must relegate them to a footnote, as the disappearance of the assize makes them useless for current law.[75] After the action upon the case for nuisance (which, in effect, is the present Common Law remedy) had emerged, the idea seems to have prevailed for a time that if the harm was caused by the defendant, but did not originate on the defendant's land, the proper remedy against him was trespass *vi*

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[71] This is really the explanation of *Fenna* v. *Clare* (1894) 64 L. J. Q. B. 238, where the question of contributory negligence was left to the jury in a case of nuisance.

[72] Romilly M.R. in *Rochdale Canal Co* v. *King* (1853) 22 L. J. Ch. 604, 606. See too *Att.-Gen.* v. *Grand Junction Canal Co.* [1909] 2 Ch. 505; *Johnson* v. *Wyatt* (1866) 33 L. J. Ch. 394; and, as to what constitutes acquiescence, Garrett, 'Nuisances' (3rd ed. 1908), 399—401. Mere delay in suing, as distinct from acquiescence, is material only with respect to the Statute of Limitations: *Jones* v. *Llanrwst U. D. C.* [1911] 1 Ch. 393, 411. For laches, see A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, 322.

[73] 'Torts' (13th ed. 1929), 417.

[74] 'Torts' (7th ed. 1928), § 58 (6).

[75] Y. B. 32 Lib. Ass. pl. 2; Br. Abr. Nusans 25 (assize of nuisance applies even if nuisance is on plaintiff's own land; and he is not driven to trespass or assize of novel disseisin: this is inconsistent with Bracton, *ante*, pp. 190—191); Paston J. *obiter* in Y. B. Mich. 19 Hen. VI, f. 29 (where nuisance is on plaintiff's own land, assize of nuisance, being a real action, must be preferred to trespass, which is a personal action).

et armis, not nuisance. Thus, in 1498 it was held that trespass *vi et armis*, and not trespass upon the case, was the correct action for a nuisance committed on the plaintiff's land,[76] and in 1656, where the defendant injured the plaintiff's building by allowing the escape from the defendant's land of filth and stinking water, and the plaintiff sued trespass *vi et armis*, it was urged that case was the proper remedy because trespass could not be committed on the defendant's own land, but 'after great wavering' the Court gave judgment for the plaintiff.[77] Now the hesitation of the Court is easy to understand, for the question, 'Where did the harm begin?' may be a pretty problem in causation; and though we hear no more of it in the reports in the shape of a dispute as to whether the trouble began on the land of the plaintiff or on that of the defendant, that is probably only because it was merged in the wider question, 'Was the damage direct or consequential?' And that is the vital distinction between trespass and case which was insisted on in later cases.

'Trespass upon the case, and trespass *vi et armis*, are different in name and in their nature; for the one [*sc.* trespass upon the case] is called an action for a nusance and the other are [*sic*] called *actiones iniuriarum*; the one [*sc.* trespass *vi et armis*] must be brought for a wrong done immediately to the person or his possession, the other for a consequential damage. . . . If logs are laid in the highway by which any person is hurt, he must bring case; but if the hurt is received by logs thrown at the person, he must bring trespass *vi et armis*.'[78]

Like every other judicial attempt to grapple with causation, this gave rise to endless arguments in border-line cases, and the unfortunate litigants were certainly not the only people who stumbled about among the logs.[79] Scientifically, matters were complicated by a subsidiary rule. Every plaintiff in trespass could tack to the claim for the immediate injury a '*per quod*,' or allegation of consequential damages. If he did that, his action for trespass always included an action on the case. Thus, 'the same evidence that will maintain trespass, may also frequently maintain case, but not *e converso*.'[80] This thickened the metaphysical mess, but assisted the administration of justice, for, to some extent, it relieved the plaintiff of the perils attaching to a wrong selection of remedy.

Upon the whole, it would appear that nuisance and trespass

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[76] Y. B. Trin. 13 Hen. VII, f. 26, pl. 4.
[77] *Preston* v. *Mercer*, Hardres 60.
[78] Fortescue J. in *Reynolds* v. *Clerk* (1725) 8 Mod. 272.
[79] *E.g. Courtney* v. *Collet* (1697) 1 Ld. Raym. 272
[80] Blackstone J. in *Scott* v. *Shepherd* (1772) 2 W. Bl. 892, 897.

are, even at the present day, distinct torts, and that the line of division between them is the old one between trespass and case.[81] Authority indicates, though not conclusively, that trespass, not nuisance, is the right action for a continuing trespass.[82] But the distinction, though verbally correct, is a hollow one, for it must be traced along the old lines of separation between trespass and case, and the *per quod* allegation, as we have just shown, went so near to obliterating these lines as to make demarcation a difficult task. Moreover, at the present day, it does not appear to be very vital to success in an action, for if the plaintiff is in doubt as to whether the injury to him is trespass or nuisance, he can easily combine alternative claims for them in the same litigation. He must, of course, see that he has evidence to satisfy the requisites of at least one of these torts, for two practical differences occur here:

(a) Trespass is a wrong to possession, while nuisance is not limited to this.

(b) In trespass, damage need not be proved, in nuisance it must be.

It is worth while concluding this article with a curious instance of the somewhat confusing medley of remedies for the same wrong, which is traceable in the historical development of liability for the escape of fire.

The principal remedy for this was trespass upon the case for negligently allowing one's fire to escape in contravention of a general custom of the realm,[83] that fires must be kept in safely. It first occurs in the reports in 1401.[84] This action was modified by legislation now embodied in an Act of 1774,[85] which exempts from liability a person in whose building or on whose estate a fire accidentally begins. In historical origin, it had nothing to do with any of the following things:—

(i) Nuisance, or any of the remedies for nuisance; in fact it was carefully segregated from these in the seventeenth and eighteenth century Abridgments of the law.[86]

(ii) Negligence as a tort, for negligence did not become a

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[81] Scrutton, L.J., in *St. Anne's Well Brewery Co.* v. *Roberts* (1928) 140 L. T. 1, 6.

[82] *Holmes* v. *Wilson* (1839) 10 Ad. & E. 503; the earlier *nisi prius* opinion of Lord Ellenborough C.J. in *Lawrence* v. *Obee* (1815) 1 Stark. 22 was cited in argument but ignored in the judgment; *Hudson* v. *Nicholson* (1839) 5 M. & W. 436.

[83] Identified by Sir Frederick Pollock with the common law: 'Torts' (13th ed. 1929), 518.

[84] 42 L. Q. R. (1926), 46—50, where its history is sketched.

[85] 14 Geo. 3, c. 78, s. 86. The Railway Fires Acts, 1905 and 1923, are not material here.

[86] Rolle, Viner, Comyns, Bacon.

tort until early in the nineteenth century.[87] '*Negligenter*,' in connexion with the action of trespass on the case for fire, merely signified one mode of committing a tort, not an independent tort. During the period in which it was becoming an independent tort, there was naturally a tendency to confuse the two meanings of the word, and the action of trespass on the case for fire did not escape altogether from this confusion.[88] Now that negligence has been insulated as a substantive tort as well as a possible mode of committing some torts, there is no reason why the escape of fire should not be treated as redressible by an ordinary action for negligence, as well as by the old action of trespass upon the case.[89]

(iii) The rule in *Rylands* v. *Fletcher*, which was not formally laid down until 1868, centuries after the action with respect to fire had been in use.

Now it was after this formulation of the rule in *Rylands* v. *Fletcher* that these remedies, which were tolerably distinct until then, have tended to become entangled with one another.

First, the rule itself was occasionally taken to be merely a variant of liability for nuisance; of this enough has been said earlier in this article.[90]

Secondly, shortly after the decision in *Rylands* v. *Fletcher* in the Court of Exchequer Chamber, the Court of Queen's Bench held in *Jones* v. *Festiniog Rly Co.* (in which Blackburn J. was one of the judges) that fire was included in 'things likely to do mischief if they escape,'[91] and that it thus came within the rule in *Rylands* v. *Fletcher*; and this has been followed in later decisions.[92] One might infer from this that the rule in *Rylands* v. *Fletcher* has entirely absorbed the old action of trespass on the case for fire, subject, of course, to the Act of 1774. And the inference is favoured by the fact that the defendant has been held liable for the default of an independent contractor,[93] which may be regarded as the hallmark of the strict liability in *Rylands*

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[87] 42 L. Q. R. (1926), 184—201.

[88] Comyns, 'Digest' (5th ed. 1822) I, 411, classifies it under 'Actions upon the case for negligence.' In *Vaughan* v. *Menlove* (1837) 3 Bing. (N.C.) 468, the idea that escape of fire might be treated as the tort of negligence seems to be emerging, but it was concealed behind the rule *sic utere tuo ut alienum non laedas*, and that futile scrap of Latin is usually cited in connexion with nuisance.

[89] Bankes L.J. in *Musgrove* v. *Pandelis* [1919] 2 K. B. 43, 46; Scrutton L.J. in *Job Edwards, Ltd.* v. *Birmingham Navigations* [1924] 1 K. B. 341, 361.

[90] *Ante*, p. 194.

[91] (1868) L. R. 3 Q. B. 733, 736.

[92] *Powell* v. *Fall* (1880), 5 Q. B. D. 597; *Gunter* v. *James* (1908) 24 T. L. R. 868; *Musgrove* v. *Pandelis* [1919] 2 K. B. 43; *Mansel* v. *Webb* (1919) 88 L. J. K. B. 323; *Job Edwards, Ltd.* v. *Birmingham Navigations* [1924] 1 K. B. 341, 351—352 (Bankes L.J.).

[93] *Black* v. *Christchurch Finance Co.* [1894] A. C. 48.

v. *Fletcher*. Yet it is doubtful whether the absorption is complete. For instance, inevitable accident is almost certainly a defence to the action upon the case for fire (even apart from the Act of 1774); but it is probably no defence under the rule in *Rylands* v. *Fletcher*, though the act of God is; and unfortunately 'inevitable accident' and 'act of God' do not mean exactly the same thing. Which of the two is applicable in injury done by escaping fire?

Thirdly, it was assumed, rather than actually decided, in 1924, that the escape of fire may be a private nuisance. The idea was in effect a novelty, for, though Littleton J. had expressed an opinion in 1468 that I can enter my neighbour's land to extinguish a fire arising by his negligence,[94] and Brooke in his Abridgment put this under the caption 'Nuisance' (pl. 14), yet he also included it under 'Trespass' (pl. 186), and in fact the case itself was neither nuisance nor trespass, but was on the writ of right; and the later Abridgments keep fire and nuisance distinct.

This historical sketch may perhaps afford some clue to understanding the case of 1924, which was *Job Edwards, Ltd.* v. *Birmingham Navigations*.[95] The action was to determine who was liable for the expense incurred in abating a fire which all parties admitted to be a nuisance. The fire had been caused by the deposit of some refuse by a trespasser on land belonging to, but unoccupied by, A. The fire spread slowly and threatened to extend to B's land. B asked A to extinguish it. A refused, but allowed B to enter his land and extinguish it. A paid to B half the cost of this, without prejudice, and then sued B to recover the payment. The Court of Appeal, by two to one, held that A's claim was good.

Now it would seem that the neat question was, 'Who was bound to abate the nuisance?' Yet the problem was discussed in at least three other aspects:

(a) As of the *Rylands* v. *Fletcher* type of liability. That was not difficult, for two of the Lords Justices identified for this purpose nuisance with breach of the rule in *Rylands* v. *Fletcher*.[96]

(b) As liability for fire under the old Common Law action. Bankes L.J. telescoped this into nuisance (a historical distortion) and nuisance into liability under *Rylands* v. *Fletcher*.[97]

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[94] Y. B. Mich. 9 Edw. IV, ff. 35—36.
[95] [1924] 1 K. B. 341.
[96] But how can the fire be said to have 'escaped'?
[97] At p. 352.

(c) Possibly as liability for the tort of negligence.

The decision is not free from other difficulties, but the chief one is that parts of the judgments flatten out somewhat violently the historical perspective of liability for the escape of fire.

The result seems to be that, at the present day, damage resulting from the unintentional [98] escape of fire may be redressible by any of the following remedies:—

(i) The old action of trespass on the case.

(ii) An action of the *Rylands* v. *Fletcher* type; query whether this has totally absorbed (i)?

(iii) An action for nuisance.

(iv) An action for negligence.

[98] If the fire is intentional it would be trespass or assault; *e.g.* deliberately throwing a lighted match on a haystack or in a man's face.

Past and present contributors to the journal will join in hearty congratulations to Dr. Arthur L. Goodhart on his election to the Chair of Jurisprudence at Oxford. He was the first editor of this journal and it is not too much to say that but for him its survival beyond infancy would have been extremely doubtful. Every one recollects the energy and tact with which he conducted the editorship, but very few know how much time and trouble he spent on what is probably the most important feature of this periodical,—the annotation of cases by students with the editor's co-operation. Naturally, our felicitations must be tempered by regret at his departure from Cambridge, but we venture to think that it is such a happy strengthening of the *liaison* which already exists between the Law Faculties at the older Universities that there is no need to sigh, 'Nihil ab omni parte beatum.' It is of interest to note that this is the second time that this Chair has been held by an *alumnus* of Trinity and an editor of the *Law Quarterly Review*. Sir Frederick Pollock held the Corpus Professorship of Jurisprudence at Oxford when he launched the *Law Quarterly Review* which, with Dr. Goodhart at the helm, is now approaching its jubilee.

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NOTES ON RECENT CASES.

CONFLICT OF LAWS — MARRIAGE — ESSENTIAL VALIDITY NO TEST OF DEFEASANCE.

Nachimson v. *Nachimson.* [1930] P. 217.

IN 1924 the petitioner and respondent, both domiciled Russians, entered in Moscow into a marriage contract valid by Russian law. Under Russian law the union so formed is between one man and one woman for life, but it may be dissolved at the wish of the parties by merely formal registration. The question was whether this marriage was valid according to English law. The *dictum* of Lord Penzance in *Hyde* v. *Hyde* (1866) L. R. 1 P. & M. 130, 133, that a marriage in English law is 'the voluntary union for life of one man and one woman to the exclusion of all others,' was accepted without demur by both Hill J. and the Court of Appeal; but while Hill J. held that, since the union could be dissolved by the wish of the parties, it was not a union for life, and therefore invalid, the Court of Appeal declined to take this view, and held that the marriage was valid.

In their opinion the mode in which a marriage might be defeated was not a test of its essential validity. The parties had bound themselves for life to the exclusion of others, and in doing so had come within the English conception of marriage. The fact that the union could be dissolved on more slender grounds than those allowed by English law was immaterial. Hill J. treated the provisions for the disruption of the union as parcel of the contract 'instead of treating them . . . as conditions of defeasance enacted by the law of the domicil of the spouses, which conditions in no way depended upon any agreement between them, and which, moreover, they were powerless to alter or escape from' (Lawrence L.J. at p. 230). The Court quoted Lord Brougham in *Warrender* v. *Warrender* (1835) 2 Cl. & Fin. 488, 533, where he said that dissolubility is not of the essence of the contract, and he added that such a view 'confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract' instead of considering that the contract and its incidents 'must be dealt with by the Courts of the country where the parties reside [*i.e.* are domiciled] and where the contract is to be carried into execution.' If conditions of defeasance were a test of validity, as Lord Hanworth M.R. pointed out (at p. 225), 'it would be a matter of degree to be determined in varying cases in various countries whether the marriage was to be estimated as binding.'

The Court of Appeal followed *Brinkley* v. *Att.-Gen.* (1890) 15 P. D. 76, where the question arose as to the validity of a marriage celebrated in Japan between a man of Irish domicil and a Japanese woman. Satisfied that according to Japanese law the union was made for life to the exclusion of all others, Hannen P. did not inquire in what circumstances the marriage could be dissolved. In *Hyde* v. *Hyde* (*supra*) the Court refused to recognize a union made between two Mormons which was valid

by their local law, on the ground that it permitted polygamy. So also in *Re Bethell* (1880) 38 Ch. D. 220 the question arose as to the validity of a union with a member of the Baralong tribe (which recognized polygamy) in Africa. The Court held that it amounted to no more than cohabitation, and was invalid. In neither case was dissolubility made a test of essential validity.

A. G. DE M.

[See Mr. Vesey-Fitzgerald's article on this case in 47 L. Q. R. 253—270. —ED.]

CONFLICT OF LAWS—RENVOI.

Re Ross; Ross v. *Waterfield.* [1930] 1 Ch. 377.

AN Englishwoman whose domicil of origin was English but who at the date of her death was a widow domiciled in Italy, by her testamentary dispositions excluded her son (and only child) from participation in her movable and immovable property situate in Italy and in her movable property situate elsewhere than in Italy. The son claimed to participate in the property of his mother.

Luxmoore J., after examining the authorities from *Collier* v. *Rivaz* (1841) 2 Curt. 855, 858, to *Re Annesley* [1926] Ch. 692, held that the law of the domicil which governs the succession to movable property belonging to British nationals dying domiciled in a foreign country, means the whole law of the country of domicil, including the rules of private international law administered by its tribunals, and that the English Courts are therefore solely concerned to inquire what the Courts of that country would decide in the particular case. In particular he held that in deciding the question whether the son was entitled to a moiety of her estate as his *legitima portio* the English Court must consider itself as sitting in Italy, *i.e.* the English Court is only concerned to see what view the Italian Courts would take of the English law. It appeared that the Italian Courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national domiciled in England, that the testamentary dispositions of the testatrix were therefore valid and made proper provision for the disposition of the property in Italy, and her son's claim to any part of her estate as his *legitima portio* would not in any circumstances be recognized as it would have been if the testatrix had been an Italian national.

It was also held with regard to the immovable property of the testatrix situate in Italy that, as the *lex situs* must be held to govern the succession to immovables, the law of the country where the immovables were situate must determine the right of succession; and the evidence showed that the Italian Courts would decide the question of succession in the same manner as the English Courts would determine it if the immovable property belonged to an Englishman and was situate in England.

Re Ross involves the vexed question whether the *renvoi* is a part of the law of England. If that term merely means the application of two or more, instead of one, of the rules of private international law (see

E. H. Abbot in 24 L. Q. R. (1908) p. 133), or that where the English Courts determine a case with reference to the law of a foreign country, they take into account the whole law of that country, including the rules of private international law maintained by its tribunals (see Dicey's Conflict of Laws, 4th ed. p. 811), then undoubtedly the English Courts have, if not previously, at least certainly by the decision in *Re Ross*, accepted the doctrine of *renvoi*.

The effect of the decision in *Re Ross*, however, is by no means clear, and it is submitted that it goes no further than to give judicial authority to Dicey's statement (*op. cit.* p. 815) that 'An English Court called upon to determine the succession to the movables of a person dying domiciled in a foreign country (*e.g.* Belgium) must decide the matter before it, as it would if sitting in Belgium, *i.e.* as if it were a Belgian Court; but this result cannot by any possibility be obtained if the English Court does not take into account the rules of private international law maintained by Belgian tribunals.'

M. H.

[See also 47 L. Q. R. 285—287.—Ed.]

Conflict of Laws—Foreign Subject—Document Executed Abroad—Administration — Conveyance inter vivos — Testamentary Document.

Re Anziani; Herbert v. *Christopherson.* [1930] 1 Ch. 407.

This case throws welcome light on the controverted question as to the law by which the validity of an assignment of a chose in action is to be governed.

By virtue of certain deeds of appointment (executed in pursuance of the settlements mentioned below) the testatrix, who was born in Italy and married to an Italian, became entitled to a sum of £50,000 charged on English freeholds held on trust for sale and certain other moneys which were comprised in a settlement (called the 'A' settlement) and to certain freeholds and moneys comprised in another settlement (called the 'B' settlement), which settlements were executed on her marriage. The testatrix and her husband lived in Italy, and she was domiciled there at the date of her death. In 1927, being then domiciled in Italy, she executed an 'appointment and assignment' expressed to be intended to operate as an assignment *inter vivos* and as a will, whereby she appointed and assigned the £50,000 and the property comprised in the 'B' settlement to certain persons (called the appointees). After the death of the testatrix leaving no other testamentary disposition, the deed of appointment and assignment was admitted to probate in the United Kingdom.

Maugham J. dismissed the suggestion that the £50,000 should be regarded as in the nature of an immovable. He distinguished *Re Hoyles* [1911] 1 Ch. 179, 184, 187, which decided that a mortgage of land is an immovable. In the present case the right of the appointees was merely to call upon the trustees to pay the amount in question, which was clearly a chose in action.

The main question, however, arose with regard to the validity of the assignment of the £50,000. By English law (*lex situs*) the assignment

was valid; by Italian law (*lex actus* and *lex domicilii*) the assignment was null and void. The learned judge held that the validity of the assignment was governed either by the *lex actus* or the *lex domicilii* (which in this case coincided) and therefore the assignment was null and void. He followed the Court of Appeal in *Republica de Guatemala* v. *Nunez* [1927] 1 K. B. 669, which closely resembled the present case. Although the Lords Justices in *Nunez's Case* came to the same conclusion and held the assignment void, they based their judgments on different grounds. The real contest was between Lawrence L.J. and Scrutton L.J. The former held that the validity of an assignment of a chose in action was governed by the *lex situs*. Scrutton L.J. held the assignment invalid on two grounds: (1) that the assignee was under an incapacity by the *lex actus* and the *lex domicilii*; and (2) that the assignment was invalid by the *lex actus* and the *lex domicilii*. Maugham J. threw in his lot with Scrutton L.J. and held that the validity of the assignment was governed either by the *lex actus* or the *lex domicilii* and in this case they were the same. He dissented from Dicey's Conflict of Laws, 4th ed. rule 153 (p. 580).

Re Anziani may be regarded as carrying one step further the exigencies of English law as contained in Scrutton L.J.'s judgment, for whereas Scrutton L.J. based his decision on the dual ground of the incapacity of the assignee and the invalidity of the assignment, in this case no question of capacity arose at all. The case was decided solely and simply on the ground of the invalidity of the assignment.

The question, therefore, by what law the validity of an assignment of a chose in action is to be governed may now fairly be taken to have received an unequivocal answer. Either the *lex actus* or the *lex domicilii* must prevail, although it still remains to be decided to which of these two laws supremacy is to be conceded should a conflict between them arise. That Maugham J. would seem to incline in favour of the *lex domicilii* is an inference that may be drawn from the following statement of his: 'I would observe that the comity of nations . . . certainly does not require the Courts of this country to recognize as valid a voluntary assignment of a movable entered into *here* [the italics are ours] by a domiciled Italian which by Italian law, for reasons of public policy, is regarded as null and void.' As to the immovables, the learned judge held that, as under the law of England an instrument may be executed which is partly testamentary and partly not testamentary, the deed of appointment and assignment, as it was expressed to be intended to operate as an assignment as well as a will, could take effect as a conveyance *inter vivos* of the immovables comprised in the 'B' settlement.

M. H.

CONSTITUTIONAL LAW—PETITION OF RIGHT—PROTECTORATE—PREROGATIVE—ORDERS IN COUNCIL AFFECTING LANDS GRANTED.

The North Charterland Exploration Co. (1910), Ltd. v. *The King.* [1931] 1 Ch. 169.

THE suppliant company, through its predecessor in title, held a concession in Northern Rhodesia from the British South Africa Co. (hereafter called the chartered company), which had granted it under its charter from the Crown. In 1928 the Northern Rhodesia (Crown

Lands and Native Reserves) Order in Council, made under the Foreign Jurisdiction Act, 1890, provided that certain lands, which were a Crown Protectorate, including parts of the concession, should be set aside as Native Reserves, '. . . and are hereby vested in His Majesty's Secretary of State and are set apart in perpetuity for the sole and exclusive use of the natives of Northern Rhodesia.' The suppliant company sued a petition of right against the Crown, alleging that the Order was void so far as it purported to set aside parts of the concession. Alternatively, they claimed compensation. The Attorney-General demurred, maintaining that the Order of 1928 was a complete answer to the petition.

The petitioners argued that, as the concession had been granted to them through their predecessors in title by the chartered company acting under its charter from the Crown, they held by grant from the Crown; that at common law the Crown cannot derogate from its grant; and that the Order in Council was wholly inoperative in so far as it purported to vest the Native Reserves in His Majesty's Secretary of State.

Luxmoore J. dismissed the petition on the following grounds: The legislative authority over a Protectorate is the prerogative of the Crown and is fettered only by Acts of the Imperial Parliament. The Foreign Jurisdiction Act, 1890, enacted that this power was to be exercised by means of Orders in Council which were to have effect as if enacted by the Imperial Parliament. By section 12, sub-section 1, if any such Order is repugnant to any Act of Parliament extending to that Protectorate or to any Order or Regulation made thereunder, it shall be void to the extent of the repugnancy; but it shall not otherwise be void on the ground of repugnancy to the laws of England (section 12, sub-section 2). Hence apart from these provisions the legislative power of the Crown over Protectorates is unfettered unless by the doctrine of derogation from grant with regard to land within the Protectorate.

Where the Crown is not the legislative authority, all grants of land by it in exercise of its prerogative are necessarily subject to the legislative authority. The grant by the Crown was an Executive act and so could not have imposed a fetter on its supreme legislative authority. The doctrine of derogation from grant cannot be applied to deprive the Crown of the legislative powers over a Protectorate in which land is granted. The case of *Campbell* v. *Hall* (1774) 1 Cowp. 204, was distinguishable. The Crown there granted to Grenada legislative authority fettered only by Acts of the Imperial Parliament, and, having reserved no overriding power, could no longer interfere in legislative matters. But the principle was inapt with regard to the present case; the Crown was not acting in derogation of grant by exercising its legislative powers, even though the exercise might affect grantees of land from the Crown; also it was doubtful whether the principle in *Campbell* v. *Hall* would now operate after the Foreign Jurisdiction Act, 1890. Hence the Crown cannot fetter its legislative authority by the mere fact that in exercise of its prerogative it makes a grant of land in a Protectorate over which such legislative power exists.

The Legislature is not held to have taken away land without giving compensation unless this is unequivocally stated. But this rule applies only to ambiguity; here there were no words capable of being construed as giving the right to compensation; also the Order did more than authorize expropriation, it expropriated directly; and in *Auckland Harbour Board* v. *The King* [1924] A. C. 318, it was held that there

must be the clear authority of Parliament to justify payment from the Public Exchequer. It was impossible to construe the Order as giving the right to compensation.

V. M. C. P.

CONTRACT—AGREEMENT IN WRITING—UNILATERAL MISTAKE AS TO CONTENTS—NON EST FACTUM—RECTIFICATION.

Blay v. *Pollard and Morris.* [1930] 1 K. B. 628.

THIS was an action for arrears of rent by B against P and M, who had entered into partnership as garage proprietors and had hired land from the plaintiff for the purpose of carrying on their business. On March 4, 1929, P and M orally agreed to dissolve the partnership, M agreeing to take over all liabilities of the firm arising after that date. But in the written agreement (which was prepared by P's father, a solicitor) M was made liable to indemnify P for all claims for rent—not only for future claims (to which he had orally agreed) but also for rent due before March 4 (to which he had not orally agreed). M looked through this agreement and signed it, though he said that he did not understand it. B obtained judgment for such arrears against both P and M, and P then claimed (by third party procedure) indemnity against M. M pleaded that he had believed the written agreement contained nothing but the oral agreement of March 4, and that the contract was therefore based on mutual mistake of fact.

In the Court of first instance, although no fraud was alleged and rectification was not demanded, MacKinnon J. held that M had in fact signed without knowing the full terms and, on these grounds, the learned judge rectified the written contract, to make it conform with the prior oral agreement.

The Court of Appeal (consisting of Scrutton, Greer, Slesser L.JJ.) reversed this decision. In effect M set up three defences: (1) *Non est factum*; (2) Mutual mistake as a ground for rectification; (3) Mutual mistake as a ground for invalidating the agreement. All these grounds were untenable.

As to the first ground, the Court held that the respondent could not have pleaded *non est factum* successfully, merely because he asserted that if he had read the agreement correctly and understood it he would not have signed it. He knew the nature of the document (that it was an agreement dissolving the partnership) and he had taken certain advantages under it; and these facts alone defeated the plea.

The second plea of mutual error was obviously untenable, for, in this case, the mistake was unilateral only. And unilateral mistake is never sufficient cause for rectification of a contract, unless fraud or misrepresentation can be shown. Here, however, it was impossible to prove that P's father (who had drawn up the agreement) had introduced the new term into it, knowing that this term had not been in the oral agreement. This would have been fraud, and fraud had not been alleged on the record and no attempt had been made to amend it.

Moreover, rectification had not been claimed by the plaintiff, and the learned judge had granted rectification, without amending the claim on the record, to make it conform with his decision. This omission, together

with the omission to allege fraud on the record, was adversely criticized by Scrutton L.J. (at p. 634), who pointed out that it was impossible for the learned judge to base his decision on a belief that there had been fraud when fraud had not been alleged (even by amendment) on the record.

The third plea failed because the mistake was not mutual.

The limits within which the plea *non est factum* may be made had already been definitely laid down in *Howatson* v. *Webb* [1907] 1 Ch. 537; [1908] 1 Ch. 1, and the present case has not extended these limits. In the absence of express misrepresentation a person of full age, and in full possession of his faculties, cannot escape from the legal consequences of a written contract which he has signed, on the ground that he did not understand it. That is evidence of negligence on his part, sufficient to override the plea.

Rectification of a written contract by reference to a previous oral agreement is permissible only where that agreement is clear and uncontradicted; so Lord St. Leonards in judgments cited in Pollock, Contract (9th ed.), 556—557.

J. A. C.

CONTRACT—BREACH OF WARRANTY—FRAUDULENT REPRESENTATION—STATUTE OF LIMITATIONS.

Lynn v. *Bamber.* [1930] 2 K. B. 72.

ON December 3, 1921, defendant sold to the plaintiff 240 plum trees warranted as 'Purple Pershores'; the plaintiff planted and tended them at considerable expense, but some years later discovered that they were an inferior species. On December 7, 1928, he commenced an action for damages on a breach of warranty under the sale of Goods Act, 1893, ss. 11, 13. The defendant pleaded that under the Statute of Limitations, 1623, the claim was barred, because the right of action accrued on the completion of the sale, and more than six years had since elapsed. The plaintiff replied that he was induced to purchase the trees by the fraudulent representation of the defendant, and that the defendant knew that he could not discover the fraud within the period of six years; on these points of law the defendant demurred.

Held by McCardie J. that either plea would prevent the Statute of Limitations from running; but that, as no fraud on the part of the defendant could be proved, he found for the defendant. He agreed that the action would be barred but for the question of fraud. Before 1873 the Common Law Courts had held that fraud was no answer to the Statute of Limitations even though the Common Law Procedure Act, 1854, s. 85, had allowed equitable answers: *Hunter* v. *Gibbons* (1856) 26 L. J. Ex. 1. In Equity, in cases of fraud, the statute did not begin to run until the plaintiff had discovered the fraud; but the Judicature Act, 1873, ss. 24, 25, provided that where the rules of equity conflict with the rules of common law with reference to the same matter, the former should prevail. As to the decisions since the Judicature Act, in *Gibbs* v. *Guild* (1882) 9 Q. B. D. 59, it was held by the Court of Appeal that concealment of fraud by the defendant prevented the Statute of Limitations from running; but the decision dealt with concealment of fraud, not with

fraud itself; moreover, Brett L.J. did not regard the action as a 'pure' common law action, but as one in which there would have been a concurrent remedy both at law and in equity.

McCardie J. held that views expressed by the Court of Appeal in *Armstrong* v. *Milburn* (1885-86) 54 L. T. 723; 2 T. L. R. 615, 616, justified his conclusion that fraudulent concealment would be a good defence even in a pure common law action. He then dealt with fraudulent misrepresentation where there was no fraudulent concealment of it; in *Oelkers* v. *Ellis* [1914] 2 K. B. 139, Horridge J. held that the Statute of Limitations would not run until fraud was discovered, although it was not concealed by the defendant. *Bulli Coal Mining Co.* v. *Osborne* [1899] A. C. 351 was decided on wider principles; in that case the Privy Council held that the Statute of Limitations did not operate until the fraud had been discovered; the decision of the Privy Council although not binding on the English Courts was approved and applied to the present case; equity and common sense agree that no man should benefit from his wrongdoing merely because he is not found out, even though he takes no active steps to conceal his misdeeds.

K. P. W.

Contract—Engagement of Actor—Breach—Measure of Damages—Loss of Publicity.

Clayton and Waller, Ltd. v. *Oliver.* [1930] A. C. 209.

C. & W., Ltd., theatrical producers, had engaged X to play one of the three leading comedy parts in a musical play at the London Hippodrome. The engagement was to be for 'six weeks certain' at a salary of £55 a week, subject to the terms of the 'Standard Contract West End,' which contained (*inter alia*) an obligation that the artist should give his exclusive services to the manager engaging him. The part submitted to X was, he alleged, trivial; and he refused to play it. No other part was offered. He therefore sued C. & W., Ltd., for damages for breach of contract. The jury returned a verdict of (*a*) £165 for loss of salary, and (*b*) £1,000 for loss of publicity, *i.e.* loss of the advertisement and reputation he would have enjoyed had the contract been performed.

In the Court of Appeal it was held that, since the plaintiff had found service for the same salary elsewhere, the award under (*a*) could not be sustained; but that as to (*b*) the verdict must stand.

The defendant company appealed. The House of Lords, after consideration, dismissed the appeal. There were two main questions on the appeal —the construction of the contract and the true measure of damages for its breach. It was held that C. & W. contracted not only to pay X a salary, but to give him the opportunity of appearing before the public in a part which answered the stipulated description. On that ground only was the condition for exclusive services intelligible. And there was adequate authority in the similar case of *Fechter* v. *Montgomery* (1863) 33 Beav. 22. That case was misunderstood in *Turpin* v. *Victoria Palace* [1918] 2 K. B. 539 (which the House of Lords now overruled), but rightly followed in *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* [1928] 1 K. B. 269.

As to damages, the rule in *Hadley* v. *Baxendale* (1854) 9 Ex. 341

applied: damages were those that might reasonably be supposed to have been in the contemplation of the parties at the time the contract was made, as the probable result of its breach. Both parties knew that as flowing from the contract the respondent would be 'billed' and advertised as appearing at the Hippodrome, and that in the theatrical profession this was a valuable right. The loss of publicity had been put by the jury at £1,000; extravagant it might be, but not so as to vitiate the verdict.

One word of caution is necessary. Manifestly the effect of the decision is not confined to the theatrical profession. But the abiding principle is this, that each contract as it arises must be considered by itself in order to see what are the engagements which each party is bound to perform. Thus, *Clayton* v. *Oliver* states no general rule; it merely declares that a Court will construe a contract according to its terms, and, in awarding damages for its breach, will follow the old and well-established rule in *Hadley* v. *Baxendale*.

F. J. R. D.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—IMPLIED CONDITION.

Walton Harvey, Ltd. v. *Walker & Homfrays, Ltd.* [1931] 1 Ch. 145. (Affirmed by C. A. [1931] 1 Ch. 274.)

THE defendants were lessees of a hotel in Manchester. In 1924 they had entered into two contracts with the plaintiffs, a firm of advertising agents, whereby the latter were entitled for a term of years to exhibit illuminated advertisements on the roof of the hotel. Before the expiration of the term the Corporation of Manchester, in exercise of statutory powers under an Act of 1920, compulsorily acquired defendants' interest in the hotel, took possession and began demolition of it. Arrangements were made by the Corporation with the plaintiffs for removal of the sign, and plaintiffs sued the defendants to recover damages for breach of the two contracts.

Bennett J. gave judgment in favour of the plaintiffs.

The defendants claimed that the case came under the general principle of discharge by impossibility of performance and cited *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180. In that case A leased a plot of land for a term of eighty-nine years to B; A retained an adjoining paddock and covenanted that neither he nor his assigns would, during the term, erect any but ornamental buildings on the paddock. A railway company, acting under parliamentary powers, took the paddock compulsorily and built a station upon it. It was held that A was excused observance of his covenant, since the railway was a new kind of assign whom A could not bind by any stipulation, and who was not in contemplation of the parties when they entered into the contract. The defendants in the present case therefore claimed that a similar implied term for discharge existed in the contract between themselves and the plaintiffs.

Bennett J., however, pointed out that *Baily* v. *De Crespigny* was no authority for the defendant's proposition, for in that case the plaintiff failed, not because the contract was discharged by virtue of an implied condition, but because as a matter of construction the railway company were held not to be the assigns of the defendant: this view is supported by Lord Buckmaster's opinion in *Matthey* v. *Curling* [1922] 2 A. C. 180,

at pp. 227—228. There was a great difference, Bennett J. held, between the circumstances of the present case and a case where a power to acquire by compulsion comes into being after the date of the contract; the defendants could not have been in ignorance of the provisions of the Manchester Corporation Act, 1920; and it was clear from the terms of the contracts and the circumstances in which they were made that no condition for discharge ought to be implied. He accordingly gave judgment for the plaintiffs.

The doctrine of the 'implied term' is of modern growth and was first expressed in *Taylor* v. *Caldwell* (1863) 3 B. & S. 826: it is fully explained in the judgment of Lord Loreburn in *Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* [1916] 2 A. C. 397, at p. 403. For the application of the doctrine two requirements are necessary: the implied condition must not conflict with the express terms of the contract, and it must be in place of what the parties would have expressed had they actually contemplated the event as it occurred. The Courts will not willingly permit a negligent party to the contract to escape the consequences of his carelessness and lack of foresight by pleading the presence of an implied term.

N. R. T.

[The Court of Appeal affirmed this decision [1931] 1 Ch. 274. The report came too late to annotate it fully. In effect, the C. A. adopted the reasoning of Bennett J., and the matter is best put in the clear and concise judgment of Romer L.J.—Ed.]

Criminal Law—Manslaughter—Joint Responsibility.

R. v. *Baldessare.* (1930) 22 Cr. App. R. 70. [1930] W. N. 193.

B was convicted of manslaughter in the following circumstances: B and C had taken M's car for a 'joy ride' without M's knowledge or consent, and C while driving it recklessly had knocked down and killed one, Waller. The jury acquitted both defendants of the larceny of the car, but convicted them both of manslaughter. B appealed on the ground that he was not driving and was not responsible for the way in which the car was being driven.

The Court of Criminal Appeal upheld the conviction. Lord Hewart C.J. said that the question was whether, although B and C had been both acquitted of the stealing, they were after that both so associated together in the driving of the car that both were guilty of manslaughter. The trial judge had, in effect, asked the jury, 'If C was guilty of criminal negligence, was B an innocent passenger, or was he a party aiding and abetting C in what he did, engaging with him in the joy ride and sharing with him not only the pleasures but also the responsibilities of driving the car?' The Court of Criminal Appeal approved the summing-up and held that there was no evidence upon which the jury could properly find this unity of purpose and act. The men had taken the car clandestinely, but not feloniously, without lights, for a 'joy ride.' These facts and the speed of the car before and after the accident could reasonably lead the

jury to find that both men were responsible for the way in which the car was being driven.

Upon the evidence it is clear that C and B were principals in the first and second degree respectively to manslaughter. Another interesting point is this. In taking the car, the prisoners certainly committed a tort, because at this time 'joy-riding' was no crime. Now in *R.* v. *Fenton* (1830) 1 Lewin 179, it was ruled that death caused in the commission of a mere trespass was manslaughter. If this ruling were still law, it would lead to the remarkable conclusion that even if C had been driving in daylight with every conceivable care and had knocked down and killed Waller he would have been guilty of manslaughter. This cannot, however, be upheld in face of the ruling of Field J. in *R.* v. *Franklin* (1883) 15 Cox 163, where the question was left to the jury on the broad ground, 'Was F negligent?' and not 'Was F committing a trespass?' In *R.* v. *Baldessare*, the line taken was seemingly that in *R.* v. *Franklin*, though when Talbot J., in the C. C. A. (22 Cr. App. R. 71) asked the learned counsel for the Crown if there was any case in which death resulting from a pure tort had been held to be manslaughter, he replied that none had been traced, apparently forgetting *R.* v. *Fenton*. In any event, if *R.* v. *Fenton* were still law, it is a little difficult to see when any tort is supposed to be complete. In this case C and B had taken the car, but not criminally. Were they still committing the tort in driving it?

P. H. D.

Powers — Powers Appendant — Powers in the Nature of a Trust — Release of Powers—Law of Property Act, 1925, ss. 155, 160.

Re Mills. [1930] 1 Ch. 654.

T by his will directed the income of his net residuary estate to be accumulated for twenty-one years following his death. Subject to certain trusts, which failed, he declared that the trust fund and all the statutory accumulations of income were to be held upon such trusts for the benefit of those descendants of T's father who, in the opinion of T's brother (one of the two trustees of the will), should evidence an ability and desire to maintain the family fortunes by replacing the sums of which it had been depleted by taxation, as the testator's brother should by deed appoint; and, in default of such appointment, in trust for such brother absolutely.

The brother by deed released the power, and a summons was taken out to determine the validity of his action.

By the Conveyancing Act, 1881, re-enacted by sections 155 and 160 of the Law of Property Act, 1925, all powers may be released by the donee. The Courts have held, however, that an exception exists in those cases on the borderline between powers and trusts, known as powers coupled with a duty, or powers in the nature of trusts.

At the hearing Eve J. decided that the present case fell into the borderline category and that therefore the power could not be released. He based his judgment upon *Saul* v. *Pattinson* (1886) 55 L. J. Ch. 831, *Weller* v. *Kerr* (1866) L. R. 1 H. L. Sc. 11, and *Re Eyre* (1883) 49 L. T. 259. In each case the wording of the instrument creating the power was held to be such as to lay a duty upon the donee of the power, and Eve J.

said that in the present case it was impossible to believe that the testator ever intended or contemplated that the plaintiff could release the power.

The Court of Appeal were unanimous in reversing this decision. Lord Hanworth M.R. said that this was clearly a power appendant, defined by Sir George Jessel in *Re D'Angibau* (1880) 15 Ch. D. 228, 232, as where the donee of the power had an interest capable of being diminished by exercise of the power. Here was a gift to the donee until appointment and a gift over to him in default of appointment. Hence it could not be contended that the testator never contemplated failure of the power.

Lawrence L.J. pointed out that the cases relied upon by Eve J. were concerned with collateral powers, and said (p. 665): 'I know of no case either before or since the Conveyancing Act in which it has been held that a power appendant or appurtenant could not be released.' He cited *Re Radcliffe* [1892] 1 Ch. 227, where a power in gross to a life tenant under a settlement to appoint among his children, with gift over to them equally in default, was held to be releasable. The learned Lord Justice considered that if such a power, with gift over to the class of beneficiaries, is releasable, then *à fortiori* one with gift over to the donee is releasable.

This case is possibly the first before the Courts in which it was claimed that a power appendant could be in the nature of a trust. While it will be a valuable precedent for rebutting such a contention in future, it cannot be said to have created a rule. Whether a power is coupled with a duty is always to be ascertained from the originating instrument, with the result that very similar powers often fall on either side of the dividing line. For instance, it was for long contended that *Brown* v. *Higgs* (1803) 8 Ves. 561 created a rule that a power to a wife in a husband's will to divide his estate among the children, with no gift over, raised a trust in favour of the children. The opposite view was taken in *Re Weekes' Settlement* [1897] 1 Ch. 289, though the authority of this decision has been impugned (Farwell, Powers, 3rd ed., 529—530). Similarly, *Re Eyre* is an exception to the strong presumption that where there is a gift over the testator does consider the possibility of the power failing, and that there is hence no duty.

E. S. F.

Real Property—Easement—Implied Right of Way—Agreement for Lease—Conveyance—General Words—Law of Property Act, 1925, ss. 62, 205.

Borman v. *Griffith.* [1930] 1 Ch. 493.

In 1923 J agreed in writing to demise to B The Gardens 'with the paddock, orchard and adjoining gardens' for seven years. These premises were in a large park and not approached by any public road. No right of way was expressly reserved to B, who was a poultry and rabbit farmer. From a public highway, a carriage drive ran through the park, past the front door of The Gardens, and on to the Hall. In 1926 J executed a lease to G of the Hall and the remainder of the park for fourteen years. At the date of the agreement of 1923 J was constructing and afterwards completed an unmetalled way from the public highway to the back of The Gardens, but B constantly used the drive after that date. G obstructed

B in his use of the drive and B brought an action claiming a right of way and an injunction.

B relied on section 62, sub-sections 1 and 2 of the Law of Property Act, 1925, whereby certain general words are deemed to be included in a conveyance, and in particular the words 'ways . . . reputed to appertain to the land,' etc. Sub-section 6 applies this to conveyances executed after 1881, and in section 205, sub-section 1 (ii), 'conveyance' includes 'a lease . . . and every other assurance of property or of an interest therein.' But the definition of 'conveyance' in the Conveyancing Act, 1881, is limited to documents made by deed.

In giving judgment for the plaintiff, Maugham J. admitted that it was decided in *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9 that where possession had been given under an agreement for a lease, of which specific performance would be decreed, the tenant held for many purposes as if a formal lease had been executed; but the learned judge also pointed out that no Court has yet held that an agreement for a lease of more than three years is an 'assurance,' and he therefore held that the agreement of 1923 was not an 'assurance' within section 205, nor, consequently, a 'conveyance' within section 62. The opposite view would have led to the result that, as 'conveyances' in the Conveyancing Act, 1881, is limited to documents made by deed, the plaintiff (whose agreement was not by deed) might have enlarged his rights to the prejudice of G and J.

It was necessary, therefore, to fall back on the doctrine that a grantor cannot derogate from his own grant. B, being entitled to specific performance, would obtain all such rights of way as would pass under a conveyance or a demise under the rule as to implied grants.

Maugham J. then laid down the general principle, as derived from cases like *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31, *Brown* v. *Alabaster* (1887) 37 Ch. D. 490, and *Nicholls* v. *Nicholls* (1899), 81 L. T. 811, that, where two properties belonging to a single owner and about to be granted, are separated by a common road, or where a plainly visible road exists over the one for the apparent use of the other and that road is necessary for the reasonable enjoyment of the property, a right to use the road will pass with the quasi-dominant tenement unless by the terms of the contract that right is excluded.

The plaintiff was therefore entitled on the evidence to the right of way he claimed, for the unmetalled way was for many of the purposes of his calling as rabbit and poultry farmer, a most impracticable way, and he had an implied right of way over the drive in the circumstances.

There has been a tendency to exaggerate the effect of the rule in *Walsh* v. *Lonsdale*. The judgment in this case distinguishes carefully between a lease and an agreement for a lease and the legal effects of each.

K. K. L.

REAL PROPERTY—SETTLED LAND—BANKRUPTCY OF TENANT FOR LIFE—CONVEYANCE BY TRUSTEE IN BANKRUPTCY TO PERSON NEXT ENTITLED—MEANING OF 'WITH INTENT TO EXTINGUISH THE SAME' IN SETTLED LAND ACT, 1925, S. 105.

Re Shawdon Estates Settlement. [1930] 2 Ch. 1.

THE tenant for life of a marriage settlement dated 1902 became bankrupt in 1907. By a conveyance dated March 21, 1929, the trustee in bankruptcy conveyed to the tenant in tail in remainder all the settled property for the residue of the life of the tenant for life with intent to extinguish the life estate therein and to vest in the remainderman the statutory powers of the tenant for life under the Settled Land Act, 1925, s. 105. The tenant for life refused to execute a vesting deed.

Section 105, sub-section 1, provides that where the estate of the tenant for life under a settlement is absolutely assured, with intent to extinguish the same, to the person next entitled in remainder, the statutory powers of the tenant for life shall cease to be exercisable by him and shall be exercisable as if he were dead.

It was argued that the 'intent' referred to in section 105 could only be the intent of the person in whom the powers are vested, *i.e.* the tenant for life; that the Act jealously secures to him the exercise of his statutory powers; that they are not assignable (section 104), and do not pass to the trustee in bankruptcy (sections 19, 24); that no assignee therefore can exercise the powers; and that the conveyance by the trustee in bankruptcy did not operate to vest the exercise of the powers in the person entitled in remainder as if the tenant for life were dead.

The Court of Appeal held, affirming a judgment of Eve J., that section 105, sub-section 1 applies not only to an assurance by the tenant for life of his estate, but to an assurance by *any* assignor in whom the estate for life is vested; that 'intent' in section 105 refers to the intention of the assignor who may be an assignee of the tenant for life; and that the tenant for life must therefore execute the vesting deed. The words of section 105, sub-section 1 are wide and there is nothing restricting its operation to the tenant for life personally, or indicating that the intention must be that of some one other than the assignor. The extinguishment which operates as the cesser of the powers of the tenant for life can be caused equally by an assurance by an assignee of the tenant for life as by the tenant for life himself.

The object of the Act is to protect the interests arising under the settlement by carefully providing that the life tenant's statutory powers (in the exercise of which he is in the position of a trustee) shall not be assigned to a stranger to the settlement. Yet the Act itself provides that certain persons who are interested in the settlement, other than the tenant for life, may exercise the powers (section 24).

The effect of the decision is therefore that a tenant for life may be divested of his statutory powers not only (1) under section 24, sub-section 1, by an order of the Court authorizing the trustees of the settlement to exercise the powers, and (2) under section 105, sub-section 1, by an assurance of his life interest by the tenant for life to the person entitled in remainder, but also (3) by such an assurance by *any assignee of the life interest.*

R. G. R.

TORT—ACTION BY WIFE AGAINST HUSBAND—MARRIED WOMEN'S PROPERTY ACT, 1882, SS. 12, 24.

Gottliffe v. *Edelston.* [1930] 2 K. B. 378.

THE plaintiff sustained injuries in a motor accident through the negligent driving of the defendant. She issued a writ against him, claiming damages in respect of her injuries, but before the trial of the action she married him. McCardie J. dismissed the action on the ground that her right of action was not such a thing in action as would become her separate property under the Married Women's Property Act, 1882; that, therefore, she was not suing for the protection of her separate property within section 12 of the Act; and that consequently the general disability of husband and wife to sue each other for a tort applied.

In a long judgment the learned judge reviewed almost the entire body of law dealing with the relations of husband and wife. There was no doubt, he said, that at common law the plaintiff could not sue her husband in an action like this. The Married Women's Property Act, 1882, was the only relevant statute. Section 12 provides that a married woman shall have the same remedies for the protection of her separate property as if she were a feme sole, but apart from this 'no husband or wife shall be entitled to sue the other for a tort.' Section 24 makes it clear that the word 'property' in the Act includes a 'thing in action.' Now the plaintiff's case was that her cause of action against the defendant was a 'thing in action,' and therefore a right of property; that upon her marriage it became her 'separate property' within the meaning of the Act; and that consequently she was entitled to enforce the cause of action against the defendant for the protection of that separate property. Undoubtedly the phrase 'thing in action' includes the right to an action for tort, but it could not have been used in that sense in the Act, for the result would be to give the wife the power to sue her husband for all pre-nuptial torts, whereas the husband would still be unable to sue his wife for any torts whatever. Moreover, the injury was not to the plaintiff's 'property' in the ordinary sense, but was to her right of personal safety. Such a right stands on the same footing as rights of character, and is not 'property' in the normal meaning of that word.

The learned judge concluded his judgment by remarking that in the legal relations of husband and wife he could see nothing but 'confusion, obscurity and inconsistency.' He hoped that the matter would soon receive the attention of Parliament.

R. S. L.

TORT—CONVERSION—FALSE PRETENCES OR LARCENY BY A TRICK—REVESTING OF PROPERTY—SALE OF GOODS ACT, 1893.

Buller & Co., Ltd. v. *T. J. Brooks, Ltd.* (1930) 46 T. L. R. 233.

THE plaintiffs, wholesale jewellers, had an arrangement with S & Co., retailers, under which customers sent from S & Co. could be supplied with jewellery by them, the wholesale price being debited to S & Co., who in turn debited the customer with the retail price. L was a customer

so sent, and a bracelet was delivered by the plaintiffs to L's agent, M. These two were working in conjunction to obtain the bracelet without payment, and M having pawned it, was convicted of larceny by a trick.

In an action by the plaintiffs against the pawnbrokers to decide the ownership of the bracelet, Wright J. held that they had no claim in law to the property, on several grounds:—

(1) He decided (in answer to a contention that the transaction was in the nature of 'on sale or return') that, even if it were such, the property passed first from the plaintiffs to S & Co., because although they had not paid they did not dispute their liability to do so, and secondly, from S & Co. to L, because, by pawning the bracelet, he 'adopted the transaction' and thereby showed himself to be the purchaser: *Kirkham* v. *Attenborough* [1897] 1 Q. B. 201, where it was decided that if a person who has received goods 'on sale or return' pledges them, he thereby does an act adopting the transaction within the meaning of the Sale of Goods Act, 1893, s. 18, r. 4 (a), so that the property in the goods passes to him. In any event, Wright J. held that the sale was out-and-out.

(2) It was contended that it was larceny by a trick, and that by section 24, sub-section 1, of the Sale of Goods Act the property would revest in the owner. Held, that in spite of the decision in the Criminal Court (which did not bind the civil Court) that it was larceny, it was a case of obtaining goods by false pretences, because the sellers intended to pass not only the physical possession in the bracelet, but also the property or a right to acquire the property: *Folkes* v. *King* [1923] 1 K. B. 282. Accordingly, section 24, sub-section 2, of the Sale of Goods Act applied, and the goods did not revest in the seller.

(3) Even if it were a case of larceny by a trick, (*a*) the goods would revest not in the plaintiffs, from whom the property had passed, but in the owner from whom they were stolen; (*b*) the Sale of Goods Act, 1893, s. 25, sub-s. 2, and the Factors Act, 1889, s. 9, provide that 'where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods . . . the delivery or transfer, by that person . . . of the goods . . . to any person receiving the same in good faith and without notice of any lien or other right of the original seller, . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods.' And the latter Act, by section 2, provides that a disposition of the goods by a mercantile agent to one who acts in good faith and without notice passes a good title.

(4) If it were regarded as larceny by a bailee on the ground that L or his agent fraudulently pledged the goods before the property had passed, then the case fell under the principles stated in (3) *supra*.

T. R. W.

TORT—DEFAMATION—HUSBAND AND WIFE—MARRIED WOMEN'S PROPERTY ACT, 1882, S. 12.

Ralston v. *Ralston.* [1930] 2 K. B. 238.

IN 1929 the plaintiff, who was living apart from her husband, saw in a churchyard in Anglesey a tombstone with the following inscription: 'In loving memory of Jennie, the dearly beloved wife of W. R. Crawshay Ralston, of the Bungalow, Valley. Died 20th May, 1916.' W. R. Crawshay Ralston was the plaintiff's husband, and had caused the inscription to be made. A deed of separation had been executed in 1899, and the plaintiff had set up as a garage proprietor, the business being later converted into a private limited company, in which she held a majority of the shares and was chairman and managing director. The plaintiff sued her husband for libel.

By the Married Women's Property Act, 1882, s. 12, husband and wife cannot sue each other in tort except that the wife can sue the husband for the protection and security of her separate property.

Macnaghten J. considered that the inscription, describing another woman as wife of the defendant, was capable of a defamatory meaning: *Cassidy* v. *Daily Mirror Newspapers, Ltd.* [1929] 2 K. B. 331. To bring the present case within the Act, the defence relied on an observation of Brett J. in *Summers* v. *City Bank* (1874) L. R. 9 C. P. at p. 583, that a married woman, suing for a libel affecting her credit and character as a trader, is suing to protect her trade and business. But this was merely an *obiter dictum.* In the case of *R.* v. *Lord Mayor of London* (1886) 16 Q. B. D. 772, opinion was withheld on the question as to whether an action for libel, as opposed to criminal proceedings, could be maintained against the husband for defamation regarding the security and protection of her separate property, and Macnaghten J. held that this question remained open. But the learned judge, assuming, though doubtfully, that the plaintiff was a trader, by reason of the position she occupied in the company, held that the inscription could not affect her credit or character in her trade. He cited *Tinkley* v. *Tinkley* (1909) 25 T. L. R. 264, where an action for false imprisonment and malicious prosecution was held not maintainable against a husband by a wife, even though she alleged that she had lost her situation as a domestic servant in consequence of his accusation of dishonesty. 'A charge of dishonesty,' he said, 'is surely more injurious to a domestic servant than is the imputation of unchastity to a garage proprietor. In the occupation of domestic service honesty is a necessary virtue: whereas it cannot be said that chastity is a necessary qualification for the management or ownership of a garage' (p. 245).

Note that it is still an open question whether the wife can sue her husband if, in fact, his defamation of her does affect her separate property.

Dealing with the argument that the covenant for further assurance in the deed of separation was a chose in action, and property, and was unsafe if the imputation were unchallenged, the learned judge said that no one had raised any question as to whether she was the lawful wife of the defendant. Judgment for the defendant would be as effective for this purpose, on the plea raised.

J. J. G. W.

TORT—DEFAMATION—LIBEL—PRIVILEGED OCCASION.

Osborn v. *Thomas Boulter & Son.* [1930] 2 K. B. 226.

THE plaintiff, who was tenant of the defendants at the Royal Oak Inn, Kidderminster, and was bound by his tenancy agreement to sell only beer supplied by them, wrote complaining of the poor quality of the beer supplied, saying that it was affecting his trade. The defendants sent one of their employees, Blakeway, to investigate, and later replied to the plaintiff's letter saying that they had heard that the plaintiff watered his beer. The letter was dictated by a member of the firm, Mr. Boulter, to his typist, and shown to Blakeway. The letter was then sent to the plaintiff, who sued the defendants for defamation.

The Court of Appeal gave judgment for the defendants, and held that (1) the occasion on which the letter was written was privileged within the principle of *Toogood* v. *Spyring* (1834), 1 Cr. M. & R. 181, because it was the interest of the one party to defend himself and the interest of the other to receive and consider the defence; (2) the protection was not lost by a communication of the contents to Blakeway, the communication to him being to ascertain whether the letter was justified in view of his report; (3) the protection of the privileged occasion was not lost by the dictation of the letter to the typist, that being a reasonable and ordinary method in commercial matters of writing letters, even though they may contain defamatory statements.

Scrutton and Slesser L.JJ. also expressed an opinion that, in spite of *John Lamb's Case* (1610) 9 Rep. 59, to read out a defamatory statement was only slander, and therefore to dictate a defamatory statement to a typist was not libel but slander. Greer J. was inclined to disagree with this.

This case follows *Edmondson* v. *Birch & Co., Ltd.* [1907] 1 K. B. 371 and *Roff* v. *British and French Chemical Manufacturing Co.* [1918] 2 K. B. 677, on the proposition that publication to a typist in the ordinary way of business on a privileged occasion does not go outside the privilege. This view, which is the opposite to that taken in *Pullman* v. *Hill & Co.* [1891] 1 Q. B. 524, is explained on the ground that business methods have changed, and it is now usual to dictate all letters to a typist. The statement of Fletcher Moulton L.J. in *Edmondson* v. *Birch & Co., Ltd.* at p. 382, was quoted with approval in the present case: 'If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.' This clearly means that if the privilege is not defeated in some other way, such as by malice, publication to a clerk in the ordinary course of business will not defeat it.

The danger of *Osborn's Case* seems to be that it may place a person's reputation at the mercy of a typist who gossips about her firm's letters, and who is not worth suing for defamation.

H. B.

TORT — DEFAMATION — SLANDER — SOLICITOR AND CLIENT — PROFESSIONAL PRIVILEGE.

Minter v. *Priest.* [1930] A. C. 558.

MINTER was arranging the sale to S of a house which Minter owned, subject to mortgages. T was Minter's agent for the sale, and S had agreed to give T half of any profit which might result from the resale of the house. S and T went to interview Priest, a solicitor who had had previous dealings with Minter, and suggested to him that he should provide the deposit-money for the purchase of the house and become their solicitor in completing the purchase. Priest refused, but suggested an alternative scheme for purchasing the first mortgage at a lower price, the profits on resale to be shared between Priest, S and T. In suggesting this scheme, Priest uttered a slander on Minter. T reported the slander to Minter, who sued Priest.

At the trial before Horridge J., T was called as a witness to prove publication, and claimed privilege, but the judge ruled that he must tell what occurred. The jury, in answer to questions put to them by the judge, found that at the time when the slander was uttered the relationship of solicitor and client did not exist between Priest and S and T, and that Priest was actuated by malice. A verdict was returned for Minter for £1,500, but the Court of Appeal ([1929] 1 K. B. 655) reversed this, holding that the words were protected on the ground of privilege. The House of Lords restored Horridge J.'s judgment on the ground that when the statements were made Priest was no longer giving advice as a solicitor but as a private speculator.

Lord Atkin pointed out that communications between solicitor and client are doubly protected. First, they are protected from disclosure by evidence. This is a personal privilege of the client which he may waive. It applies in general to all actions. Secondly, there is protection, confined to defamation, in respect of statements made. In *More* v. *Weaver* [1928] 2 K. B. 520 it was held by the Court of Appeal that this was an absolute privilege, but the noble and learned Lords reserved their opinion as to the correctness of this decision. As a test for the existence of the necessary relationship in order to ensure protection on the grounds of privilege, Lord Atkin (pp. 580—581) approved that of Cotton L.J. in *Gardner* v. *Irvin* (1878) 4 Ex. D. 49, 53, 'professional communications of a confidential character for the purpose of getting legal advice,' but added that communications for the giving of legal advice are equally protected. Communications enabling either party to commit a crime or fraud constitute an exception and are not protected.

In this case the jury had found that the relation of solicitor and client did not exist when the communication was made; but the House of Lords held that the judge ought to have decided for himself whether the occasion were privileged before putting to the jury the question of malice.

This case is remarkable for the number of minor points raised, but by no means all settled, by *dicta*. Serious doubts were cast on the decision in *More* v. *Weaver*; and while Viscount Dunedin held that T had waived his privilege of non-disclosure by publishing his statement (p. 571), Lord Atkin doubted whether he could waive it without S's consent (p. 586). It was a joint privilege of S and T.

P. W-B.

TORT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTION TO JURY.

Swadling v. *Cooper.* [1930] 1 K. B. 403; [1931] A. C. 1.

SWADLING was driving a motor-car at about thirty miles an hour along a main road, across which a less important road ran. As he approached the junction a motor-cycle, ridden by the plaintiff's husband, Cooper, emerged from the subsidiary road to cross the highway. The two vehicles collided, and the motor-cyclist was killed. It was admitted that Swadling applied his brakes, but failed to avoid the accident. Not more than a second elapsed between the moment when Swadling could have seen Cooper and the moment of collision. The widow of the deceased brought an action under Lord Campbell's Act for damages for the loss of her husband.

Humphreys J. directed the jury to find for the defendant if, though he were negligent, the accident occurred 'substantially also owing to the negligence of the deceased man himself . . . so that both parties were . . . substantially to blame for the accident.' On a request from the foreman of the jury for an explanation as to what was meant by 'substantial contributory negligence,' the learned judge said that there was no real definition of the phrase, and that it was a matter for common sense. A verdict was found for the defendant.

The plaintiff appealed, and the Court of Appeal ordered a new trial, on the ground that the jury had been insufficiently directed as to the meaning of 'contributory negligence.'

The House of Lords reversed the order of the Court of Appeal, and restored the original judgment, on the ground that since, from the moment when the two parties became aware of their respective positions, there could have been no time for the defendant to do anything to avoid the impact, it therefore appeared that the negligence of each party contributed to the collision, and that the learned judge did sufficiently explain to the jury what on the facts of this case were the considerations to which they had to apply their minds and what was the law applicable to the facts.

The law as to contributory negligence is both complex and obscure. It is illustrated by a series of cases that confuse rather than clarify the issue: cf. *Butterfield* v. *Forrester* (1809) 11 East 60, with which is contrasted *Davies* v. *Mann* (1842), 10 M. & W. 546, and *British Columbia Electric Ry. Co.* v. *Loach* [1916] 1 A. C. 719, contrasted with *Neenan* v. *Hosford* [1920] 2 I. R. 258.

In order, however, that the rules as to contributory negligence may apply, it must be proved that both parties were, in fact, negligent. The 'last opportunity' rule in *Davies* v. *Mann* could not be applied to this case, because neither party had a later opportunity than the other of avoiding the collision. The creation and the fulfilment of the danger were nearly simultaneous. An avoidance of the collision was almost humanly impossible. The act of the defendant in applying the brakes at once was all that could be asked of a reasonable and prudent man, though it was submitted that he might have swerved into the middle of the road.

'If,' says Salmond, 'on the undisputed facts of the case, the only rational inference is that the plaintiff was guilty of contributory negligence, . . . it is the duty of the judge to withdraw the case from the

jury and give judgment for the defendant.' The fact that Humphreys J. allowed the case to go to the jury seems to argue that he entertained some doubt as to the plaintiff's negligence. This gave the Court of Appeal the opportunity of ordering a new trial, but the House of Lords, in restoring judgment, indicated clearly the right principle, and also that a judge should state no more of the law than is necessary for an adequate and correct summing-up. Their Lordships certainly cast no doubt on the validity of any one of the previous decisions on contributory negligence.

E. P. S-W.

TORT—NEGLIGENCE—INJURY TO TRESPASSER—DUTY OF NON-OCCUPIER.

Excelsior Wire Rope Co., Ltd. v. *Callan.* [1930] A. C. 404.
Mourton v. *Poulter.* [1930] 2 K. B. 183.

THE facts in these two cases were very similar. In the first the appellants worked certain apparatus belonging to a haulage system on land which they used as licensees for this purpose. This land adjoined, and was not separated from, a playground, and children swarmed round and on the terminal post, as the appellants knew. On this occasion two men went down to adjust the rope before starting, and warned off the children; they then, without further precautions, started the apparatus. A small girl playing on it and her brother who tried to help her were injured. In the second case the defendant, a competent nurseryman, was felling a tree for the owner of certain land adjoining the public road. He and his assistants frequently drove away the children who inevitably collected, but two minutes before he knew the tree would fall they were still there; he gave no warning, with the result that one boy was injured.

The *Excelsior Co. Case* was taken to the House of Lords, and judgment was given in favour of the plaintiffs, affirming the decisions of the Courts below. Shearman J. held that the children were licensees and the machinery a trap; the Court of Appeal, assuming that they were trespassers, held that the appellants acted with reckless disregard of their presence; the House of Lords held the appellants liable, not on the ground of their liability as occupiers (for they were not occupiers at all), but because there was a clear duty to see that persons of whose presence they knew, and who were likely to be in danger, came to no harm. This decision was followed by Scrutton and Lawrence L.JJ. in *Mourton* v. *Poulter*, where, as a Divisional Court, they reversed the decision of the county court judge.

The first case might seem to conflict with *Addie (Robert) & Sons (Collieries), Ltd.* v. *Dumbreck* [1929] A. C. 358 (and see note in 4 C. L. J. 78), where a boy was killed by a haulage system in similar circumstances. Two distinctions may be examined. The first, suggested by Scrutton L.J. in *Mourton* v. *Poulter* at p. 190, is one of fact, that the person responsible for starting the machinery in *Addie's Case* could not, and in the *Excelsior Co. Case* could, see the seat of the accident. This additional circumstance might make the defendants liable even to trespassers, owing to 'reckless disregard' of their presence (*vide* Lord Hailsham C. [1929] A. C. at p. 365). The second and more pregnant distinction arises out of the expressions of some of the Lords in the *Excelsior Co. Case*, that Addie &

Sons were occupiers of the land, while the Excelsior Co. were only licensees. The liabilities of occupiers in such cases are settled, and were summarized by Lord Hailsham (*ubi sup.*), but it does not seem reasonable to apply these to non-occupiers, seeing that it is immaterial to a licensee whether the stranger is himself a licensee, trespasser, or what not. Of the five noble and learned Lords, Lord Atkin (pp. 412, 413) and Lord Thankerton (p. 413) referred to this point, though it is not clear how far they used it in their decisions; Lord Dunedin said (p. 411) that the question depended not on whether they were occupiers or non-occupiers, but on the answer to the question, 'Had they the right to keep children away?' Perhaps the two cases should be treated under different rules, but their general resemblance—a licensee performing a dangerous operation on another's land—seems to make it desirable to find a common basis of liability.

It is submitted that Scrutton L.J.'s suggestion (p. 191), though stated with regard to occupiers, forms a more practicable test,—that where a man makes a change in the condition of land he must use due care in warning bystanders of any danger caused thereby. But, as the learned Lord Justice pointed out, only the House of Lords can tell us the real basis of their decision, and we must wait for our information until some litigant appears to purchase it for us, and thus make known what a more explicit statement would have told us in the first instance.

In conclusion, it is worth noticing that, though in both cases the victims were young children, the fact of their tender years was not taken into account, and there seems no reason why, whatever be the principle which underlies these cases, it should not apply equally to all trespassers. Considerations of age will, however, be material in determining the amount of care necessary in order to warn such trespassers, with the result that where they are adults the duty will be considerably lighter.

J. M. S. W.

TORT—WRONGFUL EXPULSION FROM SCHOOL NOT IN ITSELF A TORT.

Hunt v. *Damon.* (1930) 46 T. L. R. 579.

IN this case the plaintiff claimed damages in tort from the defendant for (*inter alia*) breach of duty as a schoolmistress in wrongfully expelling her from school. The jury found that the defendant had acted without reasonable cause in the expulsion, and awarded the plaintiff a farthing damages.

It was argued for the plaintiff that although there might not have been a contractual relationship between her and the defendant, the latter owed her a duty, and was guilty of a tort against her in expelling her without reasonable cause. For the defendant it was submitted that the duty was to continue the plaintiff's education, that that duty was purely contractual, and that there was no privity of contract between the plaintiff and the defendant.

Lord Hewart C.J. gave judgment for the defendant, apparently on the ground that there was no evidence to support the finding of the jury that the defendant had acted unreasonably in expelling the plaintiff. But his Lordship apparently also held that even if the verdict could stand,

the plaintiff had no case. Her claim was not associated with any head of recognized tort—the claims under such heads having been abandoned or negatived. The claim that the mere fact that the defendant in the circumstances refused to continue the girl's education involved a tort was not sustained in law.

This (if the report is correct) seems to lead to the extraordinary inference that a pupil who is expelled from school on wholly unreasonable grounds has no remedy—not in contract, because *ex hypothesi* there is none between him and the master; and not in tort because none has been committed. His parent might sue on a breach of contract, and the pupil himself might sue for any independent tort (*e.g.* assault, libel) connected with the wrongful expulsion; but if no such independent tort be committed he has no remedy. Previous authorities cannot be regarded as inconsistent with this inference. In *Fitzgerald* v. *Northcote* (1865) 4 F. & F. 656, the plaintiff pupil alleged independent torts connected with the expulsion. In *Hutt* v. *Haileybury College* (1888) 4 T. L. R. 623, the pupil's claim was similar, while the parent's was in contract. In *Wood* v. *Prestwich* (1911) 104 L. T. 388, the parent's claim was on a 'scheme' which either took the place of a contract or governed it if there were one (the Court differed as to which alternative was correct).

Perhaps the result is not so serious as might appear, for if the expulsion be unreasonable, it is highly probable that the master will have committed some independent tort, *e.g.* defamation, as an incident in the expulsion.

G. F. L.

BOOK REVIEWS.

The Office of the King's Remembrancer in England. By Sir George Albert Bonner, of the Inner Temple, Barrister-at-Law, Senior Master of the Supreme Court and King's Remembrancer. London: Butterworth & Co., Ltd. 1930. xi and 185 pp. (21*s.* net.)

Sir George Bonner, the King's Remembrancer, has written a brief volume, full of interesting information, on the history and duties of the office which he holds. His four chapters are entitled 'The Office of the King's Remembrancer' (pp. 1—48), 'The Trial of the Pyx' (pp. 49—69), 'The Nomination of Sheriffs' (pp. 70—99), and 'The Old Exchequer' (pp. 100—127); and to these are appended 'Records of Proceedings of the Trial of the Pyx' (pp. 128—183), as well as an interesting case of an 'appeal of robbery,' brought by one robber against another, and an illustration, reproduced from Madox's History of the Exchequer, of the duel which the Court directed to be fought between the robbers (pp. 184—185).

Sir George Bonner's object has been twofold: first, to show the connexion of the office of King's Remembrancer with the old medieval Exchequer and the modern Treasury; second, to describe the several duties of the office in the light of historical development and present-day practice. While many details, partly derived from manuscript sources (pp. 12, 42, 83), have been brought together on these various topics, the exposition as a whole is lacking in orderly arrangement of subject-matter. Apart from the fact that there are many needless repetitions scattered through the volume, the historical development of the office does not stand out in clear perspective; and as a striking illustration of this characteristic of the book the placing of the chapter on 'The Old Exchequer' at the end, rather than at the beginning, may be mentioned. Since the author has not, unfortunately, provided an index, the reader is obliged to search in various parts of the book for information on any one of several special topics; and, moreover, if he would gain a complete view of the office of King's Remembrancer, in respect of its historical evolution and present-day position alike, he must not only read but re-read the book, at least once or twice, in order to master the scattered details and bring them into relationship one with another. This, however, is a criticism directed to the manner in which Sir George Bonner has chosen to place the subject-matter before us. It is a pity that the instructive matter furnished by the book should be partly concealed by a presentation far from lucid.

On the disputed question as to the origin of the English Exchequer, Sir George Bonner, in general reliance on Madox, advances the view that it was derived not from Anglo-Saxon institutions, but from the Exchequer of Normandy, which may have been founded, he thinks, by Rollo, first Duke of Normandy (see pp. vi, 127). While the author has considered some of the modern standard works, such as those of

Stubbs, Poole, and Oman, he has not, it may be suggested, adequately dealt with the views expressed in some of these books, nor has he made any reference to the opinions held by certain other leading historians. Richard, son of Nigel, tells us in his *Dialogus de Scaccario* (i, 4) that in his own day there were some who thought that the origins of the English Exchequer could be found in Anglo-Saxon times (cf. the remarks of the learned editors of the *Dialogus*, Oxford, 1902, pp. 1—53). It is now held by practically all scholars, however, that the Exchequer originated neither in Anglo-Saxon times nor in Normandy. As Dr. Poole, who settled the controversy by his researches, has shown, 'the Exchequer first came into existence when the chequered table was arranged for working the accounts about the middle of the reign of Henry I'; and, as organized by Roger, Bishop of Salisbury, the English Exchequer was introduced into Normandy (Poole, Exchequer in the Twelfth Century, 1912, pp. 56—60, 65; Holdsworth, History of English Law (3rd ed.), 1922, vol. i, p. 43; and cf. Haskins, Norman Institutions, 1918, p. 176). Sir George Bonner's view as to the origin of the Exchequer runs squarely counter, therefore, to the present strong current of historical teaching.

The learned author refers in more than one place to the existence of two Remembrancers of the Exchequer—the Treasurer's Remembrancer and the King's Remembrancer; but, having failed to take into account the results of certain recent researches, his account of the two Remembrancers, and of their relationship to each other, is lacking in due historical precision. His book could have been much enriched from fresh information on the early periods that is now to be found in the works of historians. Thus Poole has placed the origin of the two Remembrancers in the middle of the twelfth century, although, as he admits, they were long without the distinctive titles which they subsequently bore (*op. cit.* pp. 116—122); while both Tout (Place of Edward II in English History, 1914, pp. 345—349) and Mr. J. Conway Davies (Baronial Opposition to Edward II, pp. 124, 138, 277, 523, 527, 531, 532, 534) have illuminated the history of the two offices in the times of Edward I and Edward II.

At the present day, Sir George Bonner tells us, 'the office of King's Remembrancer is practically the sole survival, in the Supreme Court of Justice, of the old Court of Exchequer' (p. 71); and the present duties of the office, which are set out by the author clearly and systematically, are partly litigious and partly non-litigious (pp. 14—42). This aspect of the subject will be instructive to students of our present-day judicial system, who have in general but a slight conception of the part still played by the King's Remembrancer. Some of his duties possess, moreover, that quality of picturesqueness which is so often associated with the survival of ancient forms and ceremonies; and certain of the more important of these formal and picturesque duties fall into the category of the non-litigious. Thus, each year there is the ancient ceremony of rendering to the King's Remembrancer, in one of the Courts at the Royal Courts of Justice, the quit-rent services which are due to the Crown by the Corporation of the City of London in respect of certain lands in Shropshire and of a forge adjacent to the Strand in Middlesex; and, be it observed, the horseshoes and nails used in the ceremony respecting the forge are the very identical shoes and nails which, employed for over five centuries for this purpose, are still carefully preserved by the King's Remembrancer, together with the Great Seal of the Exchequer and other interesting treasures (pp. vi, 26—31).

The part played by the King's Remembrancer in two other ancient ceremonies is of even greater interest; and the author's accounts of the history and present-day usage of these ceremonies—the Trial of the Pyx and the Nomination of Sheriffs—form perhaps the most valuable portion of his book.

The Trial of the Pyx, which was formerly attached to the Court of Exchequer, but is now connected with that department of the Treasury presided over by the Chancellor of the Exchequer, was 'instituted for the purpose of securing that proper provision should be made to maintain the coinage of the country at the proper standard as to weight and purity of the metal' (p. 31); and the ceremony derives its name from the 'pyx,' or 'pixe,' as it was sometimes spelt, which is the box or chest in which the coins are placed by the officials of the Mint for the purposes of the trial. At the present time the ceremony takes places at the Goldsmiths' Hall, in the City of London. The King's Remembrancer presides at the opening of the trial; and the jury, composed of members of the Goldsmiths' Company, is sworn in by him. After a period of several weeks, during which time the jury has been occupied in the actual assay, the King's Remembrancer receives the verdict of the jury. In this final stage of the trial the verdict, drawn up in writing, is read aloud by the Clerk of the Goldsmiths' Company in the presence of the jury; and it is then handed to the King's Remembrancer, who proceeds to record it and later forwards it to the Public Record Office, where the complete file of the verdicts of juries is open to inspection (pp. 31, 32, 63, 64).

The origins of the Trial of the Pyx do not appear to have been definitely ascertained as yet; but, as suggested by Sir George Bonner, it may have grown out of a mode of assay described by the author of the *Dialogus* and later by Madox (p. 51; and see also p. 71). As the learned editors of the *Dialogus* (Oxford edition, 1902) remind us, the machinery of the early Exchequer connected with the farm of the county and the method of its payment was primitive; and 'the payment and assaying of the farm was conducted by an elaborate process, not unlike that of the more modern trial of the Pyx' (*op. cit.* p. 28).

Not less interesting is Sir George Bonner's account of the Nomination of the Sheriffs, which he appears to connect historically, in relation to the office of the King's Remembrancer, with this ancient mode, described in the *Dialogus*, of paying into the Exchequer the sums due to the King as the farms of his demesne manors, for which payment the sheriff was responsible (pp. 70—71; and cf. *Dialogus*, Oxford edition, 1902, p. 28). However this may have been, the modern ceremony of 'pricking,' Sir George Bonner tells us, 'cannot be traced back to an earlier date than the reign of Queen Elizabeth' (p. 89). At the present time it is the duty of the King's Remembrancer to prepare the Roll of Sheriffs for nomination, which is then submitted to the Sovereign for his approval (p. 71); and the King's Remembrancer is present at the ceremony of nominating the sheriffs, which is presided over by the Chancellor of the Exchequer and attended by the judges who have been on the various circuits (pp. 71, 81). As the author reminds us, the custom of selection by 'pricking' is an old one, which finds illustration when Shakespeare, in 'Henry IV,' makes Falstaff instruct Shallow to prick the Muster Roll; so that when, at the present-day ceremonial known as the 'Nomination of Sheriffs,' the King 'pricks' the chosen names with a silver-gilt bodkin, we are in the presence of the survival, from earlier times, of a mode of

selection that was once quite common (pp. 84—89). An historical instance, not mentioned by the King's Remembrancer, is found in the agreement, drawn up under Sir Humphrey Gilbert's patent of 1578, between Gilbert and the company of adventurers with him. The chief officers were to be appointed by Gilbert himself, but if their replacing became necessary during his absence from England, the company was to submit three names to Walsingham, who would 'prick' one (Carr, Select Charters of Trading Companies, 1913, p. xxxvi, n. 5).

For the elucidation of the history of nominating sheriffs, the author has drawn upon two manuscript books dealing with the practice of the office of King's Remembrancer (see pp. 83—86); and for this fresh light on an interesting ceremony, as well as for other information concerning duties connected with his office, the reader will be grateful to the present King's Remembrancer. Although his book is not in all respects abreast of recent historical research and lacks, moreover, a lucid and symmetrical arrangement of the subject-matters considered, it is nevertheless a substantial contribution to our knowledge of an ancient office which still performs useful, even if minor, functions in the administration of the King's government.

H. D. H.

Essays in Jurisprudence and the Common Law. By Arthur L. Goodhart, M.A., LL.M. Cambridge University Press. 1931. xv and 295 pp. (15*s.* net.)

This collection of Papers, published by Dr. Goodhart within the last few years in English and American periodicals, will be of permanent value to students on both sides of the Atlantic for a variety of reasons. In the first place it demonstrates a method which is too seldom exemplified. 'A second reason,' writes Dr. Goodhart, 'for the growing interest in jurisprudence is that English legal scholars have discovered that English law can be studied scientifically.' Jurisprudence, as a separate branch of study, makes little appeal to the lawyer who is imbued with the genius of the Common Law so long as it remains remote and Olympian in a rarefied atmosphere of its own. Dr. Goodhart shows with admirable aptitude and versatility that principles of jurisprudence which are sometimes regarded as mere academic theorems may be full of vitality in providing the key to essentially 'practical' legal issues. In this manner, for example, he attacks such problems as the true conception of negligence (and never was there greater need of juristic analysis than here), the lawful and the unlawful occasions of trafficking in abstention from conduct which may injure another ('Blackmail and Consideration in Contracts'), and corporate liability for tort.

In the second place, Dr. Goodhart's essays are conspicuous for their wide acquaintance with and acute analysis of case-law. Only by this method of approach, we venture to think, will the English or American teacher commend jurisprudence to the student. A valuable example of it is the manner in which Dr. Goodhart, by accurate and lucid examination of the authorities, dispels some of the obstinate *eidola* of the text-books concerning the possession of things 'casually lost' ('Three Cases

on Possession'). There could be no better example of what Dr. Goodhart insistently preaches upon the text of the *ratio decidendi*. In this connexion we are not certain that this skilled case-lawyer is wholly successful in his attempt to reduce to rule and formula the quest of the elusive *ratio decidendi* ('The *Ratio Decidendi* of a Case'). It is true enough that faulty reasoning which leads to a judicial conclusion will not *in itself* invalidate that conclusion as a *ratio decidendi*: but does it quite meet the situation to say that 'it is by his choice of the material facts that the judge creates law'? The facts which the judge selects as the basis of his decision are material only by relation to some legal principle which he, rightly or wrongly, conceives to be applicable to the issue, and in the last analysis it *is* his process of reasoning which forms the core of the matter. This seems to be recognized by Dr. Goodhart himself in other parts of the book: thus at p. 75 we read that 'not only the judgment itself, but also the grounds upon which the judgment was reached, are binding'; and again, at p. 97, 'it is the reasoned principle which is found in the case, and not merely the conclusion which is reached, which forms the precedent.' Here we may mention that in his discussion of the judge's view of the facts, Dr. Goodhart asks whether the judge can 'by making a mistake, give himself authority to decide what is in effect a hypothetical case'; and seems to suggest that he can, but that the resulting amount of bad law is negligible. We apprehend that a precedent which is in any serious degree based on a plain mistake either of law or of fact—it is of course otherwise if the mistake is merely collateral or incidental (see *Re Transferred Civil Servants (Ireland) Compensation* [1929] A. C. 242)—is not a precedent at all; and if any authority be needed for that proposition, it will be found in the observations of the Earl of Halsbury in *London Street Tramways Co.* v. *L. C. C.*, cited by Dr. Goodhart at p. 15, n. 47.

In the third place Dr. Goodhart discharges a function performed, so far as we know, by no other contemporary writer—certainly not performed so well—in stimulating the comparative study of English and American Common Law. It is exceedingly instructive—and Dr. Goodhart enjoys unique advantages as an instructor—to be shown both what different and what similar streams of legal thought are flowing in the two countries, and how they reflect different social tendencies. This Dr. Goodhart exhibits with great point and clarity in such matters as the theory of proximate cause, costs (a valuable essay on the significance of 'adjective' law), and the general attitude of the House of Lords towards the development of the law, as contrasted with that of the New York Court of Appeals. Both countries have much to learn from this kind of synthesis, which has been too greatly neglected, at all events on this side of the water. We venture to indulge what we trust is not an impertinent hope—namely, that in his future sphere of activities Dr. Goodhart will pursue this interest, for it seems to us to be of even greater value than the comparative study of European systems, greatly though that is needed.

None of Dr. Goodhart's comparisons is odious, for he is well aware that a legal temper which is appropriate in one type of society would be inappropriate in another, and his general view is that English tradition necessitates and justifies the cautious conservatism of the House of Lords, whereas the conditions of American society have demanded a greater elasticity in the adaptation of the Common Law to the social ebb and flow. This is doubtless true in the main, but we cannot resist an

impression that a more malleable disposition in some departments of English law would not be amiss. Dr. Goodhart makes clear the contrast between the tendency of opinion in England and America with regard to precedent; and while the American attitude may lead to a certain dangerous laxity, we doubt whether the rigid British adherence to precedent works quite as well or gives quite as universal satisfaction as Dr. Goodhart suggests. There are signs that some of our judges are becoming irked by the rusty fetters of precedent which are loaded upon them more and more heavily, and at least one of them has recently expressed his restiveness in plain terms (see McCardie J. in *Gottliffe* v. *Edelston* [1930] 2 K. B. 378). The Court of Appeal seems to wonder with increasing frequency what in the world the House of Lords really meant and the wonder is sometimes shared by the House of Lords itself: and from time to time we are faced with such an inextricable knot of contradictions, as that much-canvassed group of cases, *Cooke* v. *Midland Great Western Ry. Co. of Ireland*, *Addie* v. *Dumbreck*, *Excelsior Wire Rope Co.* v. *Callan*, and *Mourton* v. *Poulter*. It seems to be more and more common for the judge to be confronted with some such situation as this: Precedents B, C, D and E are cited as conclusive authorities in Case X; but it turns out upon investigation that Precedent A, which was the most relevant of all, was never cited in B, C, D and E, and these latter, therefore, on any logical system of precedents, merely beat the air. See, for example, *Re Pain* [1919] 1 Ch. 38, *Lynn* v. *Bamber* [1930] 2 K. B. 72, and *Fisher* v. *Corporation of Oldham* [1930] 2 K. B. 364. What becomes of the 'authority' of precedents when a judge is able to say, as Romer J. said, in effect, in *Re Mason* [1928] Ch. 385, 'I really cannot consider myself bound by this House of Lords decision, because an essential authority was not present to their Lordships' minds'? When this happens—and it is not likely to become more infrequent in the future—the search for binding authority seems to become both endless and hazardous. For ourselves, we feel much sympathy with Dean Wigmore's view, cited by Dr. Goodhart, that '*stare decisis*, as an absolute dogma, has seemed to me an unreal fetich.'

It would be tempting to follow Dr. Goodhart into those highly debatable matters, the 'consequences of a negligent act' and the torts of corporations. But of the former we have space only to say that the reasoning of the majority of the New York Court of Appeals in the *Palsgraf Case* does not shake our belief in the soundness, both in law and in logic, of the *Polemis Case*; and of the latter, that all Dr. Goodhart's able argumentation does not seem to us to disturb the simple and sensible principle laid down by Lord Lindley in *Citizens' Life Assurance Co.* v. *Brown* [1904] A. C. 423. What we miss here, as in most discussions of the subject, is convincing demonstration, at the outset, that the doctrine of *ultra vires* has any real relevance to liability for tort. But Dr. Goodhart's closely-reasoned thesis deserves far fuller consideration than can here be given to it.

C. K. A.

The Mandates System. By Norman Bentwich, Attorney-General of Palestine. London, New York and Toronto: Longmans, Green & Co. 1930. xi and 200 pp. (15*s.* net.) Published in Contributions to International Law and Diplomacy, edited by Arnold D. McNair, C.B.E., LL.D.

Let it be remarked at once that Mr. Bentwich has written one of the most important contributions to International Law that has appeared since the Great War turned the current of international legal development into certain new channels. The learned Attorney-General of Palestine writes, moreover, from a dual standpoint: that of the jurist who critically appraises the system of mandates and that of the statesman who has himself been intimately and actively concerned in administering that system in one of the mandated areas. While the works of other recent writers on the mandates system, especially those of Mr. Van Rees and Dr. Stoyanovsky, have helped Mr. Bentwich in the progress of his studies, his treatise bears on every page the imprint of his own original investigation and constructive thought. In the practical work of international statesmanship, especially within the new sphere occupied by the League of Nations, the Attorney-General's Mandates System will unquestionably serve as a text-book of the highest value. Nor will the fruitful currency of the book be restricted to the groups of statesmen who meet at Geneva; for it will be used with profit by the administrators of all mandated regions and, not least of all, by scholars, teachers, and students.

The work deals with five main subjects: the origin, history, and principles of the Mandates System (pp. 1—20); the A Mandates: Palestine (pp. 21—51); the A Mandates: Iraq and Syria (pp. 51—86); the B and C Mandates (pp. 87—108); and, finally, the international control of Mandates by the Permanent Mandates Commission and Courts of Justice (pp. 109—134). Mr. Bentwich has naturally distinguished the A Mandates on the one hand from the B and C Mandates on the other; and he also rightly points out that, while the several A Mandates are governed by certain general principles common to them all, 'the circumstances of the three countries, Palestine, Syria, and Iraq, were and are so different that the particular provisions of the instruments [defining the three A Mandates] varied widely and must be separately studied' (p. 21). Appended to the five chapters are the texts of most of the important documents upon which the system of mandates is based (pp. 135—194), a bibliography (pp. 195—196), and an index (pp. 197—200). Dr. McNair has contributed an illuminating editorial preface (pp. v—vii).

The reader will find that the author has dealt with many special topics of interest, as, for example, the origin of mandates as 'trusts' and the principles governing mandates, the contrast between the colonial system and the 'mandate,' the constitutions of the mandated territories, the racial and economic problems involved in the administration of these territories, and the functions of the several organs of mandate government.

One of the fundamental lines of thought which give colour to the book as a whole is that in the period since the Great War the world has seen, in the government of peoples not yet fitted for political independence, the firm establishment of the principle of 'trusteeship.' No one who reads the book attentively can doubt for a moment that the mandates system,

suffused by this ideal of the trust, has been not only successful but, in point of fact, far more successful than a cautious prophet, in 1919, would have ventured to predict. As Dr. McNair has pointed out, a 'new code of mixed law and morality' has been introduced into the relations between Western States and dependent political societies possessing racial, religious, and social characteristics different from those of Europe. The emergence of an international organ for the supervision of the government of mandated regions has been the main feature of recent history lying at the back of these changed relations. Herein lies the main difference between the old pre-war colonial system and the new mandates system. In words which Mr. Bentwich has himself written, 'The Mandate system [has] introduced two new conceptions in political science and International Law: (1) a system of national responsibility for the government of a country under the control of an international body; (2) a system of guardianship of peoples, similar to the guardianship by individuals of minor persons' (p. 17). To the student of the present-day life of the world's society of States it is obvious that these new principles introduced by the system of mandates are already influencing the government of colonial possessions—dependencies, that is, which fall outside the scope of the principle of the mandate. As Mr. Bentwich informs us, 'it is remarkable that there is a tendency to apply, in the colonies adjoining mandated areas, the principles of the mandates designed for the protection of the native inhabitants' (p. 92). The truth is—and this is a point which Dr. McNair rightly stresses—that 'what was formerly the business of the colonizing Power alone is now everybody's business' (p. vi), the primary business, to be exact, of the organs of international society.

Indeed, it may now be stated without fear of serious and enlightened contradiction that one of the beneficent results of the Great War was the institution of the complete scheme of mandates. Many readers of Mr. Bentwich's scholarly and illuminating treatise will no doubt agree with Dr. McNair when he remarks, 'The potentialities in that system are enormous: and if a vigilant public opinion can be maintained, we have opened a new chapter in the relations of the strong and the weak' (p. viii). The fundamental principles which now operate in the working of this new international instrument for the common political and social benefit of the strong and weak alike are summarized by the Attorney-General of Palestine with a master's skill, erudition, and wisdom. The book, moreover, will itself be an influential factor in the gradual rise of dependent peoples not only to a position of higher civilization, but also to an ever-increasing share in the conduct of their own affairs and of the international relations of the world's political communities.

H. D. H.

The Equity of Redemption. Its nature, history and connexion with equitable estates generally. By R. W. Turner, M.A., LL.M., Tutor in Law, University College of the South-West, Exeter. Cambridge: At the University Press. 1931. lxxii and 198 pp. (15*s.*)

This further volume of the Cambridge Studies in English Legal History will be welcomed by all interested in the growth of our law, and

the more so that it contains a long prefatory essay on the Roman *Fiducia cum creditore* and the English Mortgage from the pen of the distinguished Editor of the Series. The title of the essay is narrower than its subject-matter, which ranges over a wide field in the comparative study of the history of securities of land in various legal systems. At the same time it contains some pertinent observations on some views propounded by the learned author (see *e.g.* p. lxiv and n. 1). In this Journal it is unnecessary to add more to commend this essay to the attention of anyone concerned with the subject.

It appears from the author's preface that the Equity of Redemption was the Yorke Prize Essay for 1923, which has since been revised for publication, as is shown by the inclusion of discussions on the effect of the 1925 legislation. It is, however, doubted whether it would not have been better to have left this part of the topic alone, since the learned author, either from lack of time or space, has not always made this revision sufficiently elaborate. The views concerning the position of the equity of redemption in the current system (pp. 129—130, and appendix) require more elaboration than the dogmatic form into which they are thrown, while some matters have been overlooked altogether; for example, mortgages of copyholders are referred to in the present tense (p. 127), the Administration of Estates Act, 1925, is omitted on p. 165, registration of title as distinct from registration of deeds is not applicable to Middlesex and Yorkshire, and registration in Middlesex was rendered necessary by 7 Anne, c. 20, and in Yorkshire by slightly later Acts subsequently consolidated (p. 127), and some other slips of the pen. The essay as a whole, however, is a most stimulating, if somewhat ambitious attempt to provide a historical background for a scientific discussion of the nature of the mortgagor's interest, which is the Equity of Redemption. The sources for the history of the subject are confined to printed work, and mainly to decisions of the seventeenth and first half of the eighteenth centuries, though many later cases are cited. This period was, of course, the era in which the principles of Equity were formulated, and the detailed research into the case-law is most instructive, but it is perhaps unfortunate that the method of selection of later authorities is not clear. Indeed, one marked feature of the whole essay is the absence of reference to treatises on the law, although in a number of instances the opinions of a class of text-writers is condemned without any specific writers being named, or the authorities upon which they rely being directly cited. Examples of this peculiarity are to be found in some of the most important of the learned author's contributions to scientific discussion. On p. 76 he refers to 'those few modern lawyers' who regard an equity of redemption as an 'interest'' rather than an 'estate,' without mentioning one. Indeed, the whole discussion on 'estates' is somewhat elusive. In Chapter I, on the conception of an estate, not only does the learned author ignore the technical meaning of a 'right of entry' where he applies it to shifting uses (p. 10), but he appears to regard ownership of land as distinct from ownership of estates and interests in land as part of English law. It is conceived that even since 1925 estates are the 'things' which are owned and not the land so that much of the discussion concerning tenancy at will or by sufferance becomes unnecessary, even if a certain answer could be given to the open question whether or not they exist at law at the present day. The problem of 'dual ownership of land' does not therefore appear to arise. Similarly,

exception may well be taken to the expression 'equitable seisin' (see *e.g.* p. 84), which the learned author derives from judicial *dicta* explaining that in some Acts 'seised' may be used to cover equitable interests. It is suggested that the expression 'equitable seisin' is unnecessary and undesirable, since, though seisin in law had a peculiar significance not coincident with possession, in equity no such distinction exists, and indeed Equity has always set its face against applying the peculiar principles of seisin to interests solely recognized and enforced by the Chancery. These remarks must not be taken to discountenance the work of the learned author or the freshness both of view and of presentation. Among the valuable and instructive characteristics of the essay one of the most important is the comparative treatment of the history of the use or trust and the equity of redemption. Another suggestive comparison is made between the Roman *hypotheca* and the position of the English mortgagee. Whether or not the reader will agree with the propositions put forward he will at least find much worthy of serious consideration. It is to be hoped that the learned author will pursue his investigations in both MS. sources and the works of modern writers on jurisprudence such as are suggested by the learned Editor of the Series in his prefatory essay. It is possible that a *via media* between the analytical school, of which the learned author seems to disapprove (Chapter VII), and the historical school, in which this essay will at once assure him a place, is to be found in the classification not so much of rights but of 'things' and the juristic qualities and attributes properly belonging to them.

H. P.

The Elementary Principles of Jurisprudence. By George W. Keeton, M.A., LL.M., of Gray's Inn, Barrister-at-Law, Senior Lecturer in Law at the Victoria University of Manchester, late Assistant Tutor to the Law Society and formerly Foundation Scholar of Gonville and Caius College, Cambridge. London: A. and C. Black, Ltd. 1930. xii and 324 pp. (12*s.* 6*d.* net.)

Mr. Keeton's volume contains a revision, more adapted to the West, of lectures which he compiled in 1924 for students in Hong-Kong University. It is divided into three parts, which deal respectively with 'The State and the Law' (pp. 1—94), 'Fundamental Juristic Conceptions' (pp. 95—178), and 'The Arrangement of the Law' (pp. 179—307). Within this scheme Mr. Keeton has written on a wide variety of jurisprudential topics. Of his predecessors he is chiefly indebted to Austin, Holland, and Salmond; and in general he is to be ranked as an Austinian. His book, which is based on much study, contains some of his own thought and also certain illuminating comparisons of Western laws with Chinese law, a subject upon which he is entitled to speak as an authority. In general, the author has not brought his exposition fully into line with present-day thought; he has not, for example, considered the views of such writers as Kohler, Stammler, Gény, Saleilles, and Cardozo. He shows, moreover, a marked tendency to frame broad

generalizations, some of which are not based on adequate research. This tendency, partly marked by too much haste, has led him into making many statements that are either erroneous or misleading; and on many points, indeed, he has made broad statements that are not adequately guarded. While it may be read with profit by students of Jurisprudence who are aware of its main faults and will be led, therefore, to questionings which are essential in the fruitful study of jurisprudential subjects, the book needs, it should and must be stated, most careful revision. There is no doubt whatever that the author's mind lends itself naturally and easily to juristic thought. Even in its present immature state, the book which Mr. Keeton has presented to us bears the imprint of an alertness and strength which should in time produce, within the field of Jurisprudence, a treatise of outstanding merit.

It should be pointed out that in Mr. Keeton's treatment of the *law* and the *sources of the law*, and of the fundamental distinctions between them (pp. 29—90), there is evidenced that lack of thorough research which is noticeable in other parts of his book. In dealing, for instance, with Custom (pp. 48—54), he relies far too much upon Blackstone, von Savigny, Maine, Gray, and Salmond, and does not sufficiently base his results upon independent research; nor does he so much as refer to Professor Allen's learned account of Custom (Law in the Making, 1927, pp. 26—106). A fruitful approach to the subject might have been made by a comparative study of Custom in, say, the Roman, Canon, and Germanic laws, with reference to variations in the French and English systems. By employing an historical method, on comparative lines, he could have given us a fresh and original survey in which the distinction between Custom as binding *law* and as merely a *source* of law—a distinction which can be grasped only after historical investigation—would have emerged clearly into view. Remarking merely that the conception of Custom in Canon Law is of unusual interest and value, attention may be drawn to one of von Gierke's most valuable contributions to our knowledge of Germanic jurisprudential ideas, his *Deutsches Privatrecht*, Vol. I, 1895, pp. 112—351, in which the Germanic concept of customary law receives lucid treatment (pp. 159—176). While the vast literature on Custom is too well known to need further consideration in the present connexion, it may be remarked that a recent contribution of special value is M. Westrup's essay entitled 'Sur la notion du droit et sur le mode primitif de formation du droit positif, c'est-à-dire du droit dit coutumier' (Revue d'histoire du droit, Haarlem, tome XI, 1931, pp. 1—18). In revising, or rewriting, his book for a second edition, it may be suggested that on many topics, such as Custom, Equity, and Legislation, the author should draw more fully on the wealth of foreign legal literature.

Mr. Keeton's own personal enthusiasm as a student of Jurisprudence is marked; but many parts of his book are equally distinguished both by a certain *naiveté* in the approach to concrete problems and by the *nature artificielle* of the treatment itself. The author has in fact covered too vast a field in too short a time; and yet he has written a beginner's book that is at once interesting and suggestive. One of the greatest needs of the present time in the field of legal scholarship is the more precise delimitation of the scope of Jurisprudence in its relation to other social sciences and the more enlightened use of a combination of the historical and comparative methods of approach to the subject. If he will only

allow himself the requisite time for research and reflection, an illuminating contribution to Jurisprudence on these lines may be confidently expected from the learned author of the present work.

H. D. H.

The International Protection of Industrial Property. By Stephen P. Ladas. Harvard University Press. 1930. 972 pp. ($7.50.)

This is one of the Harvard Studies in International Law, edited by Professor Manley Hudson. Its aim is to make available to the English-reading public in a single volume the large amount of law contained in treaties, legislation, and judicial decisions and monographs relating to the international protection of Patents, Industrial Designs and Models, Trade Marks and Trade Names. Dr. Ladas begins with an outline of the relevant municipal law and tripartite treaties which preceded the creation of the International Union of Industrial Property in 1883. He then describes the foundation and the organization of the Union, and its relation to tripartite treaties and the municipal law of the member States. Separate chapters dealing with the international regime of Patents, Industrial Designs and Models, Trade Marks and Trade Names then follow, together with chapters on the effect of the World War, the Pan-American Conventions, and Future Developments.

The matter is highly technical, and it is only a reviewer who knows as much about the subject as Dr. Ladas—and we do not suppose that such an one exists—who could do adequate justice to the merits of the work. If one who is in no way an expert may venture an opinion, it is that Dr. Ladas's book is a model of what such books ought to be. It is evidently the fruit of many years of patient and careful investigation, and the results of this labour are lucidly and attractively presented. To the practitioner in these matters it must have come as a great boon. To the general lawyer who will consult it upon points of general interest such as the effect of changes in the political structure or territory of members of an International Union, the effect of changes of nationality, the application of 'national treatment' in commercial matters, the effect of a world-wide war upon the operations of an International Union during and after the war, and so on, it affords most satisfactory answers.

Students of international law and of comparative law, and specialist practitioners, must join in expressing gratitude to Dr. Ladas for achieving a task which by reason of the detail involved and the inevitable size may at times have been tedious to the author, but which has resulted in a book whose usefulness and comprehensiveness will rank high.

A. D. McN.

A Treatise on the Law of Executors and Administrators. By the Right Hon. Sir Edward Vaughan Williams. Twelfth edition. By David Hughes Parry, M.A., LL.M., of the Inner Temple, Barrister-at-Law, and John Cherry, M.A., formerly of Lincoln's Inn, Barrister-at-Law. In two volumes. London: Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. 1930. ccxix and 1558 pp. (£5 5*s.* net.)

The new edition of Williams on Executors has a peculiar interest to graduates in the Cambridge Law Faculty as being the work of two distinguished alumni, and its appearance will bring a sense of reflected glory to all those who have been more or less closely associated with the editors in the earlier stages of their law studies.

It is obvious that the preparation of this edition must, as the result of the recent Property Acts, have been a task of enormous difficulty. As the editors point out in the Preface, it has been necessary to overhaul the work thoroughly, and this has involved much re-writing of the text and the excision of a considerable quantity of obsolete matter. There is of course a large mass of new material but in spite of this it has been possible to reduce the text of this edition by some 360 pages, giving clear evidence of the 'ruthless severity' with which they claim to have treated what was considered obsolescent.

It seems to us that the editors, having of necessity to recast so much of the work in this edition, might with advantage have taken the opportunity to carry the process of compression much further and have omitted a large part of Book III of Part III, which deals with legacies, a subject which is exhaustively dealt with in Jarman on Wills. This, however, is merely a plea for economy and is not intended as a criticism of the excellent presentation of the subject-matter. The new edition throughout gives evidence of the care and accuracy with which it has been compiled, and will, we think, fully maintain the reputation of the work as the authoritative text-book on the subject.

We are interested to observe that the editors give no countenance to the somewhat extraordinary contention that section 28 of the Administration of Estates Act, 1925, has extended the right of retainer to an executor *de son tort*, and also that they take what we consider the correct view that the effect of section 34 of that Act is to put all debts on an equal footing for purposes of preference and retainer, superseding the law as laid down in *Re Ambler* [1905] 1 Ch. 697.

D. T. O.

Jarman on Wills. Seventh edition. By Charles Percy Sanger, of Lincoln's Inn, Barrister-at-Law, assisted by Irene Cooper Willis, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1930. Three volumes. cccxx and 2266 pp. (£5 10*s.* net.)

The long-expected new edition of Jarman on Wills, published last year, was not received in time for us to do more than to note its appearance and to express the universal sorrow felt at the death of its

gifted editor. It is some consolation that he lived to complete the great task involved in the preparation of this edition, which embodies the changes resulting from the recent property legislation and the considerable mass of case-law which has accumulated during the twenty years which have elapsed since the issue of the sixth edition. Probably no modern text-book has attained to such a degree of authority as that held by Jarman on Wills. Even in the author's lifetime it was allowed to be cited as a persuasive authority in the Courts, and since his death it has continued to attract an increasing measure of respect as an authority with reference to the statements of law set forth therein as the result of the author's masterly analysis of cases. This has made the work of the learned editor a task of peculiar difficulty, as it has been desirable to retain the author's text intact so far as possible, omitting only what is clearly obsolete and modifying or adding to it only to an extent which modern changes have rendered imperative. As the new legislation, in so far as it affects wills, applies for the most part only to wills coming into operation after 1925, it is still necessary to retain much of the older material as applicable to the consideration of wills of earlier date. This has been a great obstacle to any reduction in the bulk of the work which, in successive editions, had grown to formidable proportions. In spite of this, however, by systematically pruning away what was obsolete, or practically so, it has been possible to reduce the work by over 130 pages. The division of the work into three volumes will also add materially to the comfort of the reader.

As to statute law the most important changes have been those consequent on the Property Acts of 1925, and as the effect of these Acts on wills has been mainly of an indirect nature, they have increased editorial difficulties. When, however, it is realized that the preparation of the new edition has involved reference to upwards of 900 new cases which have come before the Courts during the last twenty years, the magnitude of the task will be more readily appreciated. So far as we have been able to test his work, it has been carried out with that thoroughness and accuracy which was characteristic of the editor. In the course of perusing the work, we have noticed two or three slight errors which have crept in by oversight. In the Table of Statutes (p. xxxvi) the references to section 3 and the Schedule of the Law of Property Amendment Act are misplaced under the Adoption of Children Act. On page 505, line 14, 'former' should read 'latter,' and 'latter' in the next line (line 15) should read 'former.' On p. 640, 'than' in line 11 should read 'that.'

D. T. O.

The Law of Aviation. By G. D. Nokes, LL.D., and H. P. Bridges, LL.D. London: Chapman & Hall. 1930. xviii and 220 pp. (12*s.* 6*d.* net.)

This is the best book from an English source covering the whole field of the Law of Aviation. It deals comprehensively with the law prevailing both during peace and war, both internally and internationally. It is inevitable that a topic which is mainly regulated by treaty in the international, and by statute and Order in Council in the municipal, sphere should consist very largely of regulations; but the authors have never-

theless succeeded in avoiding the appearance of a catalogue and have produced a very readable book.

Part I (Peace) contains chapters on the Regulation of Aviation, Aircraft, Personnel, Aerodromes, General Rules of Flight, and International Flight. This Part concludes with a chapter on Duties and Liabilities arising from Aviation, which, as is to be expected, is less technical and discusses many points of principle and many problems of interest to the general lawyer. We venture to suggest that in a future edition this chapter might be expanded by a more detailed discussion of the duties of carriers of persons and of goods and by an examination of the 'General Transport Conditions' upon the basis of which many, if not most, of the European air traffic companies (including the British lines) have agreed to carry on their business.

Part II (War and Neutrality) contains chapters on the Regulation of Aviation, Combatant Aircraft, Combatant Personnel, Aerial Warfare, and Belligerent Action against Civil Traffic and Civilians. In view of the almost complete absence of any law relating to air warfare, this part of the book cannot avoid being largely speculative. With the aid of Dr. Spaight's valuable monograph of 1924, 'Air Power and War Rights,' and of the proposed Air Warfare Rules drawn up at The Hague in the winter of 1922-23, and of The Hague Regulations of 1907 on land warfare, Dr. Nokes and Dr. Bridges have done the best that can probably be done at present to construct a legal system for the regulation of air warfare.

They must be congratulated on having produced a very useful pioneering book.

A. D. M'N.

La Juridiction de la Cour Permanente de Justice Internationale dans le Système des Mandats. Par Nathan Feinberg. *Rousseau et Cie.* 1930. 238 pp. (40 francs.)

This study is one of the first-fruits of the Institut Universitaire de Hautes Etudes Internationales of Geneva, and, if it is a fair sample of the work being done there, as we have every reason to believe it to be, no one will be surprised that the Institut—under Professors Rappard, Scelle and Wehberg—is taking its place among the many new centres in which International Law is being studied with an earnestness and a degree of scholarship which are rescuing it from the damaging influence of the amateur. The work consists of a detailed examination of the clause occurring in all the mandates whereby the mandatory agrees that all disputes arising between it and another member of the League relating to the interpretation and application of the mandate shall be submitted to the Permanent Court—a clause which is likely to prove to be one of the most fruitful sources of the compulsory jurisdiction of the Court. Hitherto the only cases which have come to the Court under this clause are those between Great Britain and Greece arising out of the Mavrommatis Concessions, so that Dr. Feinberg's work has a special interest for the English lawyer.

It is a careful and scholarly contribution to the literature of International Law.

A. D. M'N.

The British Year Book of International Law, 1930. Eleventh year of issue. Humphrey Milford, Oxford University Press. vi and 285 pp. (16*s.*)

The British Year Book may claim its place among the regular publications which are indispensable to those who wish to keep abreast of developments in a special branch of law. It is therefore only necessary to note briefly the contents of this volume, which is somewhat less both in pages and price than that of the previous year. Professor Brierly submits the underlying principles of the General Act of Geneva, 1928, to a searching examination. There are critics of international affairs who see in the pacts and agreements of recent years a persistent policy of turning the flank of the Covenant itself. Professor Brierly is not so cynical, but he indicates plainly the disadvantages of the General Act in its provisions for Conciliation for Judicial Settlement and for Arbitration. Dr. McNair, appreciating the unsatisfactory result of the attempts that have been made to lay down rules applicable to all treaties in general, discusses the functions and differing legal characteristics of treaties with a view to framing special rules appropriate to the character of each kind. Mr. Beckett, in an article whose length is justified by the value of its contents, analyses the decisions of the Permanent Court to discover a great number of points of general application both of law and practice which have arisen incidentally. Dr. Lauterpacht, in considering the objection to obligatory judicial settlement of international disputes which is based on the absence of an international legislature, puts forward the suggestion that the Permanent Court should be empowered, in addition to giving judgment in accordance with the existing legal position, to state an opinion as to the reasonableness or justice of the legal principles which it has had to apply for the attention of the political organs of the international community, especially the Council of the League. Space allows only mention of the other articles—the Optional Clause by Sir John Fischer Williams, by Mr. Fachiri on the protocol of accession of the U.S.A. to the International Court and the protocol for the revision of that Court's statute, by Professor Manning on the proposed amendments of the Covenant, and by Mr. Somervell on the Indian States. There are some thirty pages of Notes, and the usual reports of judicial decisions of international tribunals and those of national tribunals involving points of International Law.

J. W. C. T.

Sovereignty and Paramountcy in India. By Julian Palmer, of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1930. 104 pp. (5*s.* net.)

Sir William Holdsworth, in an article entitled 'The Indian States and India' (*Law Quarterly Review*, October, 1930), explained the legal principles upon which the conclusions contained in the Report of the Indian States Committee, of which he was the legal member, were based. Mr. Palmer, in the course of a searching analysis of the legal basis of

the relationship between the Paramount Power and the Indian States, agrees in substance with the findings of the Committee and with much of Sir W. Holdsworth's reasoning. Mr. Palmer emphasizes more clearly than previous contributors to the inquiry that the Paramount Power is not the Government of British India, but the Crown acting through the Governor-General in Council. The fact that the Political Department is the organization which conducts relations with the Indian States has tended to obscure this point, the importance of which has been increased of late years by the constitutional reforms affecting the Government of India. In dealing with that Government, the States are true contracting parties; in economic matters adjustment must be on the principle of mutual fair dealing, since there is a contractual bond between the Government and the States. But in relation to the Paramount Power itself constitutional relations are not of necessity consensual, so far as they depend upon usage or custom. The author seeks to draw a distinction between ancient custom as a source of law and modern constitutional usage, which he asserts produces *resultant rights*, or rights which result at various times in the existence of a given society from the nature of such society and its growth. His object in maintaining the distinction is to explain how the constitutional relationship since 1858 has been determined by usage which is to some extent fixed in advance by political conditions at the will of the Paramount Power, not with the consent of the States. But is not this true of custom in general as a source of law? Mercantile law is predetermined by the practices which merchants follow; it is to that extent fixed in advance. Paramountcy, which depends upon political rather than economic factors, is explicable by regarding current usage and custom as a source of new constitutional law, at least as much as ancient custom is the source of constitutions.

We have found this little book very helpful towards an understanding of a little-known and unique constitutional relationship.

E. C. S. W.

An Introduction to the Science of Law. By Albert Kocourek, Professor of Law at the Northwestern University. Boston: Little, Brown & Co. 1930. xii and 343 pp.

It is to be hoped that this book will not be placed in the hands of English law students, because the inevitable result must be to aggravate the more or less dormant, but nevertheless unfortunate, antipathy felt by many undergraduates towards the study of theoretical jurisprudence in its various manifestations. This is said with real regret, since much that is valuable is contained in these pages, and the work taken as a whole is, in certain respects, an extremely interesting and stimulating introduction to the subject. A detailed discussion of the author's treatment of the principles of Jurisprudence would be out of place here, but the main objections to the methods which he has adopted would seem to be twofold. To begin with, one meets in many places with an obscurity of statement which must be baffling to anybody who is likely to read an introductory study of this nature (*e.g.* the reader is introduced to Neo-Hegelianism without any explanation of its bearing on legal theories).

Further, the author has succumbed to the temptation to devise a novel phraseology, which purports to clarify existing terminology, but in effect only makes it more difficult to understand topics which are already abundantly obscure. The reader is confronted with such terms as 'Zygnomic' and 'Mesonomic.' The so-called Immunity—Disability relation is explained by the following formula: [A) $<\overset{+}{\longrightarrow}$ B].

Surely it is time to call halt to these and similar efforts to transplant the terminology and methodology of the mathematicians, the engineers and the physicists on to the wholly uncongenial soil of legal theory. This process can only lead to the obfuscation of legal concepts, and must inevitably bring theoretical jurisprudence into disrepute. Binder, for instance, rendered a great disservice to clear legal thinking when he invented the term '*norm.*' The writings of our English legal philosophers (not excluding Austin), and in particular those of the great modern French jurists, have shown how unnecessary it is to resort to the use of phraseology borrowed in part from Germany and in part from the neo-physicists. The matter is one of some moment, particularly in England, where the study of the law in an academic direction is being pursued in circumstances of difficulty which cannot fail to be enhanced if concepts which should be simplified as much as possible, are stated in words which can only be understood by those who have invented them. It may be that legal English is not sufficiently supple for all purposes, but in that event it can be supplemented by a resort to the phraseology of Roman law, with the aid of which most, if not all, of the difficulties can be surmounted. The invention in any language of terms '*ad hoc*' is a dangerous expedient and one which should be avoided whenever possible. It is difficult to avoid the suspicion that some modern writers do not themselves always clearly understand their expositions: it is certain that their readers are often left in the dark.

H. C. G.

Les Ordonnances Civiles du Chancelier Daguesseau. By Prof. Henri Regnault. Paris: Recueil Sirey. 1929. xix and 658 pp.

Daguesseau was one of the great French jurists of the early eighteenth century, but his fame rests chiefly on his pioneer work in the field of the unification of French law. Perhaps the most remarkable of his achievements in this direction was the '*Ordonnance sur les Donations*' of 1731, which forms the subject-matter of Professor Regnault's learned treatise. This Ordonnance, which was absorbed to a large extent into the Code Napoleon, was based on replies elicited by a questionnaire submitted by Daguesseau to the 'Parlements' and superior courts of France. This raw material had disappeared—at least so it was thought—until the guardian angel who watches over bibliophiles led Professor Regnault to a book stall on which he found a bound manuscript containing a copy of the replies returned by the Parlement of Grenoble to Daguesseau's questionnaire. The finder has utilized this discovery to the best advantage and has given us an extremely able and careful study of the early French law relating to Gifts. The importance of his work may be gauged by

the fact that it is prefaced by an introduction from the pen of Professor Capitant, who is perhaps the leading '*Civiliste*' of the present time. This treatise may, in fact, be regarded as indispensable to a serious study of the history of the French law of property.

H. C. G.

The Contract of Sale of Land, as affected by the Legislation of 1925. By T. Cyprian Williams, Bencher of Lincoln's Inn. London: Sweet & Maxwell, Ltd. 1930. lxvi and 294 pp.

Mr. Cyprian Williams, the author of the classic treatise on the Law of Vendor and Purchaser, is one of those great lawyers who have by their achievement honoured the memory of a great father. His work is of so high an order of scholarship that there are few men living on whose part it would not be an impertinence to commend it.

The origin of this monograph on the contract of sale of land is, the author tells us, that in the course of revising his book on Vendor and Purchaser he decided that it might be useful to publish the present terms of an open contract. But, the law being the 'seamless web' that it is, one thing led to another, and the result is a sort of digest of the law governing sales of land.

The introduction contains the following warning as to the confusion which the Law student must face. 'He must learn what is the common law of the sale of land; what are the rules of equity which temper, etc.; what are the enactments which vary, etc.; what are the general conditions of sale which modify, etc.; what are the special conditions of sale which qualify, etc.; and, further, what are the remedies which enable the parties to enforce the contract consisting of the special conditions of sale qualifying, etc., etc.' After this explanation, though both the plain man and the student may not go so far as to endorse Mr. Bumble's conclusion (*infandum, inter juris-consultos non nominandum*) with respect to the law (see 'Oliver Twist,' Chap. LI), it is likely that they will not dissent from the use of the choice expression ascribed to Oliver Cromwell, and will concur in the description of the average contract for the sale of land as an 'ungodly jumble.'

The appropriate comment is that the more ungodly the jumble, the greater the gratitude due from the student to Mr. Williams.

It is pleasant to see the dedication in memory not only of the author's brother, also an eminent lawyer, but also of F. W. Maitland.

H. A. H.

Theory of Legislation. An Essay on the Dynamics of Public Mind. By E. Jordan, Professor of Philosophy in Butler University, Indianapolis. Progress Publishing Company. 1930. 486 pp.

This is an elaborate and learned work in a new field. It appears to be designed for the advanced philosopher, not the average lawyer—at least, not the English lawyer. This is borne out by the following extracts:

'As law-making, legislation is not the production of specific laws, but the promulgation of constitutional law, the assertion of the elemental principles by which life embodies itself in the progress of the living' (p. xi). 'It is this methodology as circumstantial and executive in social or cultural fact that constitutes the legislative process as ontologically real; and it is this description, with its appropriate logical synoptics, that we mean by the theory of legislation.' It is somewhat difficult to follow the learned author in the entire thesis, and some of the definitions are verbose and difficult to grasp. The author may make a good case for the view that 'The statute is not law until properly adjudged so by reflective decision' (p. 450) and that 'The judgment of the Court is thus compulsive, while the act of the Legislature is persuasive'; but this is all somewhat astounding and certainly at variance with the lawyer's conception.

T. E. L.

The Law of Auctions, Estate Agency, Valuation and Commission. Third edition. By Heber Hart, K.C., LL.D., Recorder of Ipswich. London: Stevens & Sons, Ltd. 1930. xlviii and 463 pp. (15*s.* net.)

The value of this edition has been enhanced by the incorporation of over two hundred new decisions, all of which are dealt with in the body of the text. The facts are set out clearly and the principles of law involved are considered in detail. Amongst recent decisions discussed are *Chaney* v. *Maclow* (p. 157), as to the authority of the auctioneer to sign the memorandum at his own office after the conclusion of the sale and departure of the purchaser; *Cohen* v. *Roche* (p. 155), where the printed name of the auctioneer on the catalogue was held a sufficient signature of the memorandum. *Curtis* v. *French* (p. 95) is an important decision which turns upon the interpretation of clause 10 of the National Conditions of Sale, 1925. The learned author justly doubts whether the Auctions (Bidding Agreements) Act, 1927, has not failed to make any substantial improvements in the law as to 'knockouts.' There is a good index, a table of cases and statutes, and an appendix of relevant statutes. The work is a complete and reliable guide on matters which constantly crop up in practice.

T. E. L.

Annual Survey of English Law, 1929. London School of Economics and Political Science (University of London) Department of Law. 1930. xxx and 277 pp. (10*s.* 6*d.*)

This number maintains the high standard of the 1928 Survey, and the work has been rendered still more useful by the addition of Tables of Statutes and of Cases. The whole field of legal development during the year 1929 is dealt with from the point of view of legislation, literature and case-law. The fertility of the latter is at once apparent. There is a careful analysis of the leading decisions, and the 'authors'

suggest an occasional criticism (p. 159, of an insurance decision); and at pp. 162—164 there is a comment on the unsatisfactory state of the law as to the liability of an infant for goods supplied. At p. 64 we note that the costs in *Graigola Merthyr Co.* v. *Swansea Corporation* [1929] A. C. 344 amounted to £70,000—a prohibitive price for justice. *Re Silva*, at p. 76, is a reminder that the distinctions between real and personal property have not been completely abolished. A statutory regulation often honoured in the breach is noted at p. 56—'When a motor-car is stationary on the highway, no one may use any "instrument for the purpose of giving audible warning, except when . . . necessary on grounds of safety."'

The whole work is exceedingly well done, and is invaluable for keeping the law up to date.

T. E. L.

Notes on Perusing Titles and on Practical Conveyancing. Twelfth edition. Vol. I. By Lewis E. Emmet, Solicitor. London: Solicitors' Law Stationery Society, Ltd. 1930. lxxi and 885 pp. (30*s.*)

The first edition of Emmet appeared in 1895; the twelfth in 1930. No better evidence could be adduced of its merits and well-deserved popularity. The greater part of the text in the present edition has been rewritten, and recent decisions have been carefully sifted and incorporated in the text. The meticulous care with which the work has been done is further shown in the Addenda, which contain cases decided whilst the book was in the press, and the substituted references to the Law Reports. Doubtful and difficult points are tackled, and well reasoned solutions are submitted. The work is full of learning.

The 'settled land or trust for sale' controversy is well handled at pp. 646—651, and sound arguments are given in favour of the view that section 199, sub-section 1 (i) L. P. A. impliedly overrides the equitable doctrine of *Le Neve* v. *Le Neve* (pp. 166-8). There is a little duplication in the treatment of *Re Forsey and Hollebone's Contract* at pp. 116 and 208, perhaps well deserved on the score of its importance. It is doubtful whether *Green* v. *Whitehead* (p. 291) is an illustration of the rule that trustees must not delegate their discretionary powers, for as Mr. Radcliffe points out in the *Law Quarterly Review* for 1930, p. 274, Lawrence L.J. in the Court of Appeal (142 L. T. R. at p. 4) makes it clear that no question arose as to the delegation of *discretionary powers*, because the trustees themselves had negotiated the terms of the sale. The delegation of the *ministerial act* of executing a conveyance has always been possible.

The whole work is arranged in a most convenient way for the busy practitioner; the synopses at the head of each chapter and the new and comprehensive index will enable points to be referred to without difficulty. Emmet is an indispensable guide in the wide field of investigation of title, and the new edition is a real service to the profession.

T. E. L.

Wurtzburg's Law of Building Societies. Sixth edition. By G. W. Knowles, M.A., Barrister-at-Law. London: Stevens & Sons, Ltd. 1931. xxxv and 326 pp. (20*s.* net.)

In 1874, when building societies first came under statutory regulation, they were commonly non-permanent institutions of no great social or economic weight. They rapidly received, however, the support of the shrewd middle classes; and in the twentieth century, owing no doubt to the increasingly wide distribution of wealth, they have made phenomenal progress, until at the present day several of them are fairly comparable in resources with the insurance companies and major co-operative societies.

Mr. Wurtzburg's book, as the acknowledged legal work on the subject, has consequently assumed more and more importance. The present edition marks this fact by including the relevant statutes, with marginal references to the text, and by generally increasing the scope of the book. It would in our opinion have been valuable if forms of building society mortgages had been included and commented on. These documents are *sui generis* in many respects, and we should have liked to see in Chapter V a rather fuller development of the cases where there is inconsistency between the contract of membership and the terms of a mortgage; and likewise of the legal position of a private person who takes a transfer of a building society mortgage.

Mr. Knowles, however, has produced a most useful edition, and the suggestions above made are intended to be constructive and in no sense derogatory. The book is a mine of up-to-date information, well printed and indexed, and not expensive at the price of 20*s.* net.

H. E. S.

Buckley on the Companies Acts. Eleventh edition. By W. G. Brown, R. J. T. Gibson and the Hon. D. B. Buckley, Barristers-at-Law. London: Stevens & Sons, Ltd. 1930. lxxxvii, 976 and cxxi pp. (£2 12*s.* 6*d.* net.)

Palmer's Company Law. Thirteenth edition. By Alfred F. Topham, LL.M., Bencher of Lincoln's Inn, One of His Majesty's Counsel, assisted by A. R. Taylour, Barrister-at-Law. London: Stevens & Sons, Ltd. 1929. clxxiv and 766 pp. (25*s.* net.)

Following upon the coming into operation of the Companies Act, 1929, the new editions of these two works are the most important ones since 1908, and it is only considerations of space which prevent their receiving in this number of the Cambridge Law Journal the lengthy notice which they both deserve. But happily no wealth of words is required to give these books their due. It is sufficient—because the highest possible—praise to say that each is fully worthy of its predecessors.

The respective editors have adhered to the particular method and outlook of the authors: that is to say, 'Palmer' consists of a continuous narrative, concise, well arranged, well indexed, sparing in the expression

of mere opinion; while 'Buckley' takes the form of a full commentary upon the statute, section by section, and is free with shrewd criticism and guidance upon points of obscurity and difficulty. Readers might, by the way, have welcomed more attention from both sets of editors to the *Biddulph Agricultural Society Case.* They will, however, now have the benefit of the light thrown upon it by the decision of the House of Lords in *Hole* v. *Garnsey* [1930] A. C. 472.

The profession is under a renewed debt of gratitude to the learned editors for exceedingly valuable and thorough editions of these two classics.

H. E. S.

Palmer's Company Law, with an Appendix containing the Companies Act, 1929, and the Companies (Winding-up) Rules, 1929. Fourteenth edition. By Alfred F. Topham, LL.M., Bencher of Lincoln's Inn, One of His Majesty's Counsel, and A. M. R. Topham, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. clxxiv and 768 pp. (25*s.* net.)

The new edition incorporates the Winding-up Rules of 1929 and the new Order LIIIb of the Rules of the Supreme Court. There is evidence of careful revision of the last edition, and all recent decisions of importance have been noted. A useful feature of the present edition is the addition of marginal notes to the Act showing where the sections are discussed in the text.

Supplement to Palmer's Company Precedents. Thirteenth edition. Parts I, II and III containing amendments in the Precedents and Notes consequent upon the Companies Act, 1929, with an Appendix containing the Act and Rules of 1929. By Alfred F. Topham, LL.M., One of His Majesty's Counsel, and A. R. Taylour, Barrister-at-Law, assisted by A. M. R. Topham, B.A., of Lincoln's Inn. London: Stevens & Sons, Ltd. 1930. La 8vo. vii and 364 pp. (21*s.* net.)

This supplement has been issued pending the publication of a new edition of the Precedents which shall incorporate the additions and modifications necessitated by the enactment of the Companies Act, 1929. The work is done with great care and accuracy, and the disadvantages to the draftsman of having to correlate the smaller work with the previous three volumes are minimized by a very thorough scheme of reference. There is also the real advantage that in no other way could his attention be more pointedly directed to the changes effected by the new Act during the first few years of its operation.

The principal changes are in the winding-up volume. The Supplement gives the new Order LIIIb in full. In the reviewer's opinion the

Precedents lose nothing of their value by reason of the supplement being contained in a separate volume. And it is, of course, indispensable pending the rewriting—a big task—of the Precedents in a fourteenth edition.

H. E. S.

Principles of Company Law. Seventh edition. By Alfred F. Topham, LL.M., One of His Majesty's Counsel, Bencher of Lincoln's Inn. London: Butterworth & Co. 1929. 8vo. xlvii and 420 pp. (*7s. 6d.* net.)

This new edition of Mr. Topham's admirable work incorporates the changes in Company Law effected by the Companies Act, 1928, and subsequently embodied in the consolidating Act of 1929. There is no better and clearer book on the subject for students, and it furnishes an excellent introduction to the larger treatises on Company Law. The comparative table, showing the relation of the sections of the Act of 1929 and of Table A to the corresponding provision in the Act of 1908 will be found of great use in practice.

D. T. O.

A Handbook on the Death Duties. Second edition. By H. Arnold Woolley, Solicitor. London: The Solicitors' Law Stationery Society, Ltd. 1930. xvi and 188 pp. (*10s. 6d.*)

The author is well known to readers of *The Times* through the letters he contributes from time to time calling attention to anomalies produced by these duties, and particularly to hardships caused to widows and others by the principle of aggregation which is inherent in the English system. Though Mr. Woolley's book is primarily a handy work for practitioners, even the candidate for the Law Tripos requires some slight acquaintance with the subject of death duties, for he meets with limited owners' charges for the recoupment of duties paid by the tenant for life and charges in favour of the Inland Revenue Commissioners as possible registered incumbrances against the legal estate. Indeed they serve the useful purpose of demonstrating the difficulty of regarding the so-called registered equities as rights *in personam*. Chapter XIII, 'The Effect of Foreign Domicile,' emphasizes the ever-increasing importance of the Conflict of Laws. It is to Chapter XV, 'Methods of Mitigating the Duties,' that the reviewer turns with most interest. We believe the author agrees with us in declining to accept the view that it is unpatriotic or immoral to avoid the incidence of taxation where Parliament has not imposed it. A case either falls within a taxing Act or it does not. The subject need not, and indeed, unless he is a philanthropist, should not, attract the tax to his estate if the Legislature has not brought his interest within the terms of the statute. It is evasion to avoid a tax due; it is prudent and entirely proper so to dispose of one's property that it is non-taxable. Mr. Woolley not only discusses some of the

better-known methods of mitigating the duties, but attempts a critical examination of the complicated provisions of the Finance Act, 1930, Part III.

E. C. S. W.

More Misleading Cases. Reported, edited and annotated by A. P. Herbert. London: Methuen & Co. 1930. viii and 196 pp. (5*s.* net.)

This well-known 'law reporter' needs no introduction. In his selection of cases he is a formidable rival to the more orthodox members of his clan. The student who finds Constitutional Law tedious would be able to face his examiners with some, if not perhaps perfect, equanimity, were he to confine his reading to this series alone, and in particular to the litigation between Mr. Haddock and various organs of the Executive. Not the least amusing feature is the footnotes, while the Index is the only one we have ever read and re-read through line by line.

E. C. S. W.

The Law of Hire Purchase. By W. G. Earengey, LL.D., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1930. xliv and 256 pp. (15*s.* net.)

It is some evidence of the extension of hire-purchase dealings that the table of cases in this book covers thirty-two pages of print. It is sixteen years since the last edition of Russell on the Hire Purchase System, and in the interval the system has been extended to a large number of articles, particularly in the 'luxury' trades. The variety of forms in use and the danger of any particular precedent becoming obsolete are the author's grounds for omitting a precedent. Since the book is likely to be consulted by laymen interested in this type of trading, the omission is prudent.

The Law of Martial Rule. By Charles Farriman, Williams College. Chicago: Callaghan & Co. 1930. viii and 257 pp. (Price not stated.)

This book was received too late for detailed review. It covers the principal cases of martial rule in the Empire, as well as in the author's own country. We cannot find any reference to the only decision of the House of Lords (so far as we know) directly in point—*Clifford and O'Sullivan* [1921] 2 A. C. 570—though the Irish cases of that date are discussed in detail.

Dart's Treatise on the Law and Practice relating to Vendors and Purchasers of Real Estate. Eighth edition. By the late E. P. Hewitt, LL.D., K.C., and M. R. C. Overton, M.A., of Lincoln's Inn, Barrister-at-Law, sometime scholar of Trinity College, Oxford. London: Stevens & Sons, Ltd. 1929. Two volumes. cclxxvi and 1368 pp. (Price £5 net.)

Since the last edition of Dart's treatise appeared nearly a quarter of a century has elapsed. It is obvious, therefore, that the present edition must be in many respects a new book. The wisdom of the policy of putting new wine into old bottles has often been questioned in this Journal. If there is to be such a perpetuation of the title of a book written long ago, the publishers and the profession are to be congratulated on the fact that a lawyer as able as Mr. Overton should have been persuaded to undertake so thankless a task. It is on him that the main burden of the work fell. The manuscript of the first volume was prepared by Mr. Hewitt and Mr. Hughes Parry, and has been little altered since it left their hands. Mr. Hewitt then died, and Mr. Hughes Parry was unable to take part in the production of the second volume. By means of addenda, the cases cited have been brought down to October 1, 1929.

H. A. H.

Current Research in Law for the academic year 1929—30, based on a survey made by the Johns Hopkins University Institute of Law. Baltimore: The Johns Hopkins Press. London: Humphrey Milford, Oxford University Press. 298 pp. (9*s.* net.)

This book aims at putting legal scholars on the track of any piece of research at present in progress in the United States. It is itself a monument of industry, and reveals what immense activity there is in the field of legal research across the Atlantic. It will be invaluable to anyone interested in any particular topic of comparative law.

H. A. H.

Law of Property in Land. By H. Gibson Rivington, M.A., Solicitor. London: The 'Law Notes' Publishing Offices. 1930. xx and 522 pp.

No one has taught so many lawyers such Real Property Law as they know as has Mr. Rivington. He is well known as a most effective lecturer, and he has edited Gibson's Conveyancing, Snell's Equity, and the 'Law Notes' Guide to the Property Statutes. A book of his own on the Law of Property in Land is therefore most welcome. It is not intended to be a beginner's book; it is too little explanatory for that. It assumes an elementary knowledge on the part of the reader, and, while

it is obvious from its size that it is not a cram book, aims at enabling a student to revise quickly for examination purposes.

But the book is much more than it professes to be. For it contains at every turn indications of Mr. Rivington's own valuable opinion on doubtful points, especially on the interpretation of recent legislation. The purely academic teacher will turn to it repeatedly for illuminating comment, and seldom in vain.

H. A. H.

The Lawful Pursuit of Gain. By Max Radin. Boston and New York: Houghton Mifflin Co. 144 pp. ($1.25.)

This is a small book which forms one of a series issued under the title of the Barbara Weinstock Lectures on the Morals of Trade. These lectures are stated to deal 'with the various phases of the moral law in its bearing on business life under the new economic order.' It consists of an introduction followed by five chapters on Law and the Hard Creditor, the Rapacious Creditor, the Dishonest Vendor, Unfair Competition, and the Future of Business respectively. *Prima facie* there does not seem to be much here to concern a lawyer, but the author has read voluminously, and gives complete references in notes which form a substantial portion of the book, so that, if the unattractive style of the text be suffered, many points of practical use and interest will be found.

J. W. C. T.

Upon Slavery in Ptolemaic Egypt. By W. L. Westermann. New York: Columbia University Press. London: Humphrey Milford. 1929. 69 pp. (18*s.* 6*d.* net.)

This slim, well-produced volume contains a photograph, transliteration, translation, and discussion of a papyrus dated about 200 B.C. and concerned with the tax on sales of slaves. It is clear that such sales had in general to be registered and were subject to a tax which varied with circumstances, but was usually about 20 per cent. of the price. The editor discusses with considerable ingenuity and a wealth of references various questions raised by the document; much of his information is interesting and instructive; but his conclusions sometimes seem to go further than the evidence warrants, and must not be accepted without reserve.

P. W. D.

An Outline of International Law. By Dr. Julius Hatschek. English translation by C. A. W. Manning. London: G. Bell & Sons, Ltd. 1930. (16*s.*)

This book is one which English students of International Law might well study with advantage. As the translator says in his foreword, it is

now more than ever necessary for the English lawyer, who is interested in International Law, to read the views of foreign jurists. The opinions of an eminent German scholar are here set forth with great clarity and forcefulness and should well repay reading, though the book is not one for beginners.

The author's treatment of the position of the League of Nations is most interesting and instructive, though some of his views are at variance with those of most English writers.

A word of praise is due to the Translator, who has done his work admirably.

Elements of the Law of Contracts. By Arthur Berriedale Keith, D.C.L., D.Litt. Oxford: At the Clarendon Press. (5*s.*)

This little book should prove useful to many readers. As the author himself states, it is nothing more than an introduction to the study of the English Law of Contract, but the law student may well find it valuable to read this book before embarking upon one of the standard works upon the subject. The author has also been successful in eliminating technicalities as far as possible, and the book should therefore be of interest to the layman and especially to the business man.

In future editions a slightly fuller treatment of the rules governing Formation of Contracts, Negotiability and Dissolution of Contracts by Performance would probably be welcomed. The index is good and there is a useful little Bibliographical Note.

The Elements of Roman Law, being Selections from the Institutes of Justinian, with Explanatory Notes, for the Use of Students. Edited by R. B. Howes, M.A., LL.D. (Dublin), Lecturer in Law in the University of Cape Town, and R. P. B. Davies, B.A. (Cape and Oxon), formerly Lecturer in Roman Law at the University of Cape Town. Cape Town and Johannesburg: Juta & Co., Ltd. 254 pp. (25*s.*)

This work, which has been compiled primarily for the use of Articled Clerks in the Union of South Africa, consists of a selection of those parts of Justinian's Institutes which are useful for modern students, followed by translations and short explanatory notes. It is well conceived and simple in plan, and although more elementary than most of the English text-books on the subject, will be found of great utility for students in their first year and especially in connexion with construing classes.

D. T. O.

Odgers' Principles of Pleading and Practice. Tenth edition. By W. Blake Odgers, M.A., and A. H. Armstrong, B.A. London: Stevens & Sons, Ltd. 1930. lxxx and 542 pp. (15*s.* net.)

Little need be said of the tenth edition of this excellent book except in continued praise of it. We first became acquainted with it in its fourth edition, and we have never ceased to wonder at the author's gift for making interesting one of the dullest branches of legal study. The learned editors have taken account of several alterations in procedure since 1926. A new class of actions has been added to those which may commence by a specially indorsed writ; improvements have been made in third party procedure; and, since January 1, 1930, every judge of the King's Bench Division has complete discretion over the costs of the action even when he is sitting with a jury.

P. H. W.

'Law Notes' Year Books, 1929—30—31. By the Editors of 'Law Notes.' The 'Law Notes' Publishing Offices. I (1929), xxxi and 276 pp. II (1930), xxiv and 200 pp. III (1931), xxvii and 252 pp. (10*s.* 6*d.* net.)

This very useful volume will receive a warm welcome. The Annual Alphabetical Digest of the Statutes, Cases, etc. issued by the Editors of 'Law Notes' has become an almost necessary part of a law student's equipment. The inclusion of the three years 1929 to 1931 in one volume will be found of some convenience, even to those who already have the earlier issues.

Ancient Law. By Sir Henry Sumner Maine, with an Introduction by C. K. Allen. London: Humphrey Milford, Oxford University Press. 12mo. xxviii and 344 pp. (2*s.* net.)

Maine's Ancient Law, on its first publication in 1861, was immediately recognized as an epoch-making work on historical jurisprudence. Although later researches and discussion have shown that some of the author's conclusions cannot be accepted as accurate, it is remarkable to what a small extent the work has been affected by subsequent investigation. The useful Introduction supplied by Professor Allen points out very adequately to the student those parts of the work which should be received with caution.

The work will always maintain its position as a classic in Jurisprudence, and the inclusion of it in the 'World's Classics' series in so dainty a form and at so low a price should appeal to a large circle of readers.

Other books and publications received (some will be reviewed in next issue):—

Études sur les Voies d'Exécution en Droit Anglais. Par JEANNE AMOUROUX-MÉNARD, Docteur en Droit. Paris: Librairie Arthur Rousseau. 1930. xix and 505 pp. (60 fcs.)

The Law of the Taxing Power in Canada. By W. P. M. KENNEDY, M.A., Litt.D., Trinity College, Dublin, Professor of Law in the University of Toronto; and D. C. WELLS, M.A., University of Toronto, Barrister-at-Law. University of Toronto Press. 1931. xvi and 157 pp. ($3.)

A Bill to Provide a Public Service for Conciliation. By J. J. SPRIGGE. Foreword by SIR JOSIAH STAMP, C.B.E. London: Williams & Norgate. 1931. ii and 60 pp. (3*s.* net.)

Public Works Facilities Act, 1930, and the Procedure thereunder. By F. N. KEEN, LL.B., of the Middle Temple, Barrister-at-Law, and H. ROYSTON ASKEW, B.Sc. (Eng.), A.M.I.C.E., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1931. xvi and 151 pp. (10*s.* net.)

The Morality of Punishment: With some suggestions for a general theory of Ethics. By A. C. EWING, M.A., D.Phil. (Oxon.). With a Foreword by DR. W. D. ROSS. London: Kegan Paul, Trench, Trubner & Co., Ltd. 1929. xiv and 223 pp. (10*s.* net.)

Rechtsschoepfung und Rechtsgestaltung. Von DR. WILHELM GLUNGLER. Drilte Neubearbeitete Auflage. Druck und Verlag von Otto Maidl, München. 86 pp. (RM. 2.50.)

De Rechtspraak van de Landraden Naar Ongeschreven Recht. Voor Mr. B. TER HAAR BZN. Weltevreden: G. Kolff & Co. 1930. 44 pp. (No price stated.)

Yaarboekje der Rechtshoogeschool te Batavia, 1930. Batavia: G. Kolff & Co. 1930.

Handbook of the Cambridge Law School, 1930—1931. Cambridge: Printed at the University Press for the Faculty Board of Law. viii and 142 pp. (2*s.* 6*d.*)

The Bell Yard. Being the Journal of the Law Society's School of Law. No. VI, November, 1930. Editors: R. S. T. CHORLEY, M.A., and E. C. ROBBINS. The Solicitors' Law Stationery Society, Ltd. 52 pp. (2*s.*)

The National University Law Review. Vol. X, No. 2, May, 1930. National University Law School, Washington, D. C. Subscription Price, $1.50 per annum. 75c. per number. Contains articles on 'British Prize Courts and Dominion of the Seas,' by C. F. CARUSI; and "Niccolo Machiavelli; his Contribution to the Social Sciences,' by CONSTANTINE D. KOJOUHAROFF.